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## **TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1962**

**No. 58**

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**RUDOLPH LOMBARD, ET AL., PETITIONERS,**

**vs.**

**LOUISIANA**

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF LOUISIANA**

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**PETITION FOR CERTIORARI FILED DECEMBER 23, 1961  
CERTIORARI GRANTED JUNE 25, 1962**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 58

RUDOLPH LOMBARD, ET AL., PETITIONERS,

vs.

LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF LOUISIANA

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[fol. 1]

**IN THE CRIMINAL DISTRICT COURT  
FOR THE PARISH OF ORLEANS**

No. 168-520

Information for Violating Revised Statute 14:59(6)

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STATE OF LOUISIANA

VERSUS

ORETHA CASTLE, SYDNEY LANGSTON GOLDFINCH, JR.,  
RUDOLPH LOMBARD, CECIL WINSTON CARTER, JR.

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CHRONOLOGICAL ORDER OF MINUTE ENTRIES

Copy of Minute Entry of Wed., October 5, 1960

The above defendants appeared at the bar of the court. \* \* \* Sidney L. Goldfinch by John Nelson, Esq., and Rudolph J. Lombard, Oretha Castle and Cecil W. Carter, Jr., by Collins, Douglas and Elie, Attys., \* \* \* and each arraigned on the charge preferred against them and each pleaded not guilty thereto. \* \* \* The court allowed the defendants, Sidney L. Goldfinch, Rudolph Lombard, Oretha Castle and Cecil Winston Carter, Jr., until October 17, 1960 to file further pleadings. \* \* \*

---

Copy of Minute Entry of Mon., October 17th, 1960

The above defendants appeared at the bar of the court, attended by their counsel, John P. Nelson, Esq., and Lolis Elie, Esq. Mr. Nelson presented to the court on behalf of all defendants a motion to quash, together with a memorandum of authorities. The court ordered the same filed and set the matter for hearing on November 3, 1960. The court allowed the defendants until October 24, 1960, to file any further authorities. The defendants were released on their bond to await further proceedings.

---

Copy of Minute Entry of Thurs., November 3, 1960

The above defendants appeared at the bar of the court. Sydney Goldfinch, Jr., attended by his counsel, John P. Nelson, Esq., and Rudolph J. Lombard, Oretha Castle and Cecil W. Carter, Jr., attended by their counsel Lolis Elie, Esq., and N. R. Douglas, Esq., for hearing on defendants' motion to quash. The state was represented by Robert Zibilich, Assistant District Attorney. Mr. Zibilich presented to the court, the State's answer to the motion to quash and the court ordered the same filed. The above [fol. 2] answer was accompanied by a memoranda of authorities, which the court also ordered filed. Both sides being ready, DeLesseps S. Morrison, Joseph I. Giarrusso, Wendell Barrett were duly sworn by the clerk, testified for the defense and cross-examined by the state. In connection with the testimony of Wendell Barrett, Mr. Nelson reserved a bill of exceptions when the court limited a question asked by Mr. Nelson of the witness, as noted by the stenographer. Also in connection with the testimony of Mr. Barrett, the state made several objections to questions asked by Mr. Nelson. The court sustained the objections. Mr. Nelson reserved bills of exceptions, as noted by the stenographer. In connection with the above testimony, Mr. Nelson filed in evidence, Page Seven—Section One of the Times-Picayune, dated Tuesday, September 13, 1960, marked S-1; Page Eighteen—Section One of the Times-Picayune, dated Saturday, September 10, 1960, marked S-2 and House Bills Nos. 343 through 366 included of the Louisiana House of Representatives as indicated in the Official Journal of the House of Representatives of the State of Louisiana for the year 1960; and Acts of the Louisiana Legislature for the year 1960 Nos. 69, 73, 77, 78, 79, 70, 76, 81 and 68. The court ordered the above filed of record. The defense rested. The state rested. The matter was then submitted by the state and defense. The court took the matter under advisement and the defendants were released on their bond to await further proceedings.

Copy of Minute Entry of Monday, November 28th, 1960

The defendants, Sidney L. Goldfinch, Jr., Rudolph J. Lombard, Oretta Castle and Cecil W. Carter, Jr., appeared at the bar of the court, attended by their counsel John P. Nelson, Esq., Lolis E. Elie, Esq., and Nils R. Douglas, Esq., for decision on the motion to quash filed by defendants. The state was represented by Robert Zibilich, Assistant District Attorney. The court in a written opinion rendered the following judgment: "The court holds L.S.A.-R.S. 14:59(6) constitutional, and the bill of information filed thereunder good and sufficient in law. The motion to quash [fol. 3] is overruled and denied. New Orleans, Louisiana, 28th., day of November, 1960. (signed) J. Bernard Coker, Judge." The court ordered the judgment recorded. Mr. Nelson, on behalf of all defendants reserved a bill of exceptions to the court's ruling, all as noted by the stenographer. On motion of Mr. Zibilich and by agreement of counsel for defendants, the trial of the above matter was set for December 7, 1960. The defendants were discharged on their bond to await further proceedings.

Copy of Minute Entry of Wednesday, December 7, 1960

The above defendants appeared at the bar of the court. Sidney L. Goldfinch attended by his counsel, John P. Nelson, Esq., and Rudolph L. Lombard, Oretta Castle and Cecil W. Carter, Jr., attended by their counsel, Lolis Elie, Esq., and Nils Douglas, Esq., for trial. The State was represented by Robert Zibilich, Assistant District Attorney. Both sides being ready, Robert Glen Graves was duly sworn by the clerk, testified for the state and cross-examined by the defense. In connection with the testimony of Mr. Graves, the state made objections to several questions by Mr. Nelson. The court sustained the objections. Mr. Nelson reserved bills of exceptions, as noted by the stenographer. On several questions by Mr. Elie, the state objected. The objections were sustained by the court. Mr. Elie reserved bills of exceptions, as noted by the stenographer. On (sic) Mr. Nelson objected to questions asked by the court of the witness. The court overruled the ob-

jections. Mr. Nelson reserved bills of exceptions, as noted by the stenographer. Wendell Barrett was duly sworn by the clerk, testified for the state and cross-examined by the defense. In connection with the testimony of Mr. Barrett, Mr. Nelson objected to questions asked by the court of the witness. The court overruled the objections. Mr. Nelson reserved bills of exceptions, as noted by the stenographer. The state objected to several questions asked by Mr. Nelson. The court sustained the objections. Mr. Nelson reserved bills of exceptions, as noted by the stenographer. Capt. Lucien Cutrera was duly sworn by the clerk, testified for the state and cross-examined by the defense. In connection with the testimony of Capt. Cutrera, the state objected [fol. 4] to several questions asked by Mr. Nelson of the witness. The court sustained the objections. Mr. Nelson reserved bills of exceptions, as noted by the stenographer. Mr. Nelson reserved a bill of exceptions to remarks made by the court, all as noted by the stenographer. Mr. Nelson objected to several questions asked by the state of the witness. The court overruled the objections. Mr. Nelson reserved bills of exceptions, as noted by the stenographer. Maj. Edward Reuther was duly sworn by the clerk, testified for the state and cross-examined by the defense. In connection with the testimony of Maj. Reuther, Mr. Nelson made an objection, which was overruled by the court. Mr. Nelson reserved a bill of exceptions, as noted by the stenographer. Bernard Fruehtweig was duly sworn by the clerk, testified for the state and cross-examined by the defense. Mr. Zibilich requested of the court that he be allowed to show a certain film, taken by the witness. There being no objection, the court ordered the film shown. Mr. Zibilich offered in evidence, the roll of film shown to the court, marked S-1. The state rested. Mr. Nelson moved the court for a directed verdict. The court denied the motion. Rudolph J. Lombard, Cecil W. Carter, Jr., Sydney L. Goldfinch, and Oretta Castle were duly sworn by the clerk, testified for the defense and cross-examined by the state. The defense rested. The state submitted the matter without argument. Mr. Nelson made an argument for the defense. The matter was submitted. The court rendered the follow-

ing judgment: "Dec. 5/60. Each defendant guilty as charged. (signed) J. Bernard Coker, Judge." The court ordered the judgment recorded, the witnesses discharged and the defendants discharged on their bond to await sentence on January 3, 1961.

---

Copy of Minute Entry of Tuesday, January 3, 1961

The defendants, Sydney L. Goldfinch, Jr., Rudolph J. Lombard, Oretha Castle and Cecil W. Carter, Jr., appeared at the bar of the court, attended by their counsel, John P. Nelson, Esq., and Nils Douglas, Esq., for sentence. Mr. Nelson presented to the court, on behalf of all defendants, [fol. 5] a motion for a new trial and a motion in arrest of judgment. The court ordered the motions filed. The matter of the motion for a new trial was submitted by both sides. The court overruled the motion for a new trial. Mr. Nelson reserved a bill of exceptions, as noted by the stenographer. The matter of the motion in arrest of judgment was submitted by both sides. The court denied the motion in arrest of judgment. Mr. Nelson reserved a bill of exceptions, as noted by the stenographer. And the Court continued the matter of sentence in the above matter to January 10, 1961, and ordered the defendants released on their bond to await further proceedings.

---

Copy of Minute Entry of Wednesday, January 10, 1961

The defendants, Sydney L. Goldfinch, Jr., Rudolph J. Lombard, Oretha Castle, and Cecil W. Carter, Jr., appeared at the bar of the court, attended by their counsel, John P. Nelson, Esq., Nils Douglas, Esq., and Lolis Elie, Esq., for sentence. Mr. Nelson presented to the court on behalf of all defendants, bills of exceptions Nos. 1, 2, 3, and 4. The court received the bills, signed same and ordered same filed. The court signed and ordered filed its per curiams to defendants' bills of exceptions, Nos. 1, 2, 3, and 4. All of the above was done in open court prior to sentence and the signing of the application for an appeal. The defendants were each sentenced by the court to pay a fine of Three hundred and fifty (\$350.00) Dollars and imprison-



ment in Parish Prison for Sixty (60) days and in default of the payment of fine to imprisonment in Parish Prison for Sixty (60) days additional. Mr. Nelson, on behalf of each defendant, presented to the court an application for an appeal to the Louisiana Supreme Court. The court signed and ordered filed the application for appeal, making same returnable February 1, 1961 and with bail in the sum of \$750.00 for each defendant, pending appeal.

[fol. 6]

IN THE CRIMINAL DISTRICT COURT  
FOR THE PARISH OF ORLEANS

INFORMATION

The State of Louisiana) ss:

Robert J. Zibilich, Assistant District Attorney for the Parish of Orleans, who in the name and by the authority of the said State, prosecutes, in this behalf, in proper person comes into the Criminal District Court for the Parish of Orleans, in the Parish of Orleans, and gives the said Court here to understand and be informed that one

Sydney Langston Goldfinch, Jr., one  
Rudolph Joseph Lombard, one  
Oretha Castle, and one  
Cecil Winston Carter, Jr., each,

late of the Parish of Orleans on the seventeenth day of September in the year of our Lord, one thousand nine hundred and sixty with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans, did wilfully, unlawfully and intentionally take temporary possession of the lunch counter and restaurant of McCrory's Store, a corporation, authorized to do business in the State of Louisiana, located at 1005 Canal Street, and did wilfully, unlawfully and intentionally remain in and at the lunch counter and restaurant in said place of business, after Wendell Barrett the Manager, a person in charge of such business had ordered the said Sydney Langston Gold-



finch, Jr., Rudolph Joseph Lombard, Oretha Castle and Cecil Winston Carter, Jr. to leave the premises of said lunch counter and restaurant, and to desist from the temporary possession of same, contrary to the form of the Statute of the State of Louisiana in such case made and provided and against the peace and dignity of the same.

Robert J. Zibilich, Assistant District Attorney for the Parish of Orleans.

[fol. 7]

ENDORSEMENTS ON THE REVERSE OF THE INFORMATION  
FOR VIOLATING REVISED STATUTE 14:59.6

No. 168 520

Section "E"

STATE OF LOUISIANA

versus

SYDNEY LANGSTON GOLDFINCH, JR., ET AL.

Information for Vio: R.S. 14:59.6

Filed Sept. 28th, 1960

(Sig) DAN B. HAGGERTY, Deputy Clerk.

Each Arraigned Oct. 5th, 1960 and  
pleaded Not Guilty. (Sig) E. A. MOURAS,  
Minute Clerk.

Defendants allowed until Oct. 17 /60 to file  
further pleadings. (Sigd.) E. A. MOURAS,  
Min. Clk.

Oct. 17/60—Motion to quash filed by all defendants. Matter set for <sup>4</sup>hearing on Nov. 3/60. (Sgd) E. A. MOURAS, Min. Clk.

---

Nov. 3/60. The State filed answer to motion to quash. Motion to quash heard and submitted by the state and defense. The court took the matter under advisement. (Sgd) E. A. MOURAS, Min. Clk.

---

Nov. 28/60—Motion to quash overruled & denied: (see written opinion in file). (Sgd.) E. A. MOURAS, Min. Clk.

---

[fol. 8]

Dec. 7/60—Each defendant guilty as charged. (Sgd.) J. BERNARD COCKE, Judge.

---

Jan. 3/61—Motion for new trial and motion in arrest of judgment filed by defendants. Matters heard and submitted. The court overruled the motion for new trial and denied the motion in arrest of judgment. Matter cont. to Jan. 10/61. (Sgd) E. A. MOURAS, Min. Clk.

---

Jan. 10/61—Bills of exceptions Nos. 1, 2, 3, & 4 filed by defendants and signed by the court. The Court signed and ordered filed per curiam to bills of exceptions. The court sentenced each defendant to pay a fine of \$350.00 and imprisonment in Parish Prison for 60 days and in default of fine to imprisonment in Parish Prison for 60 days additional. Motion for appeal filed by each deft. and the court signed

the application for appeal to the Supreme Court of La., with bail in the sum of \$750.00 for each deft., pending appeal. (Sgd) E. A. MOURAS, Min. Clk.

[fol. 9]

IN THE CRIMINAL DISTRICT COURT  
PARISH OF ORLEANS

[Title omitted]

MOTION TO QUASH—Filed October 17, 1960

Now into this Honorable Court comes Rudolph Lombard, Oretha Castle, Cecil Carter, Jr., and Sydney L. Goldfinch, Jr., and having heard that they have been charged in a Bill of Information in the above entitled and numbered cause, and protesting that they are not guilty of the offense set out in the said Bill of Information; moves to quash the said Bill of Information in its entirety for the reason that movers are deprived of the due process of law and equal protection of law guaranteed by the Constitution and law of the State of Louisiana, and of the United States of America as follows:

1. That the statutes under which defendants are charged are unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United States of America, and in contravention of the Constitution of the State of Louisiana, in that they were enacted for the specific purpose and intent to implement and further the state's policy of enforced segregation of races.

2. That the said defendants are being deprived of their rights under the "equal protection and due process" clauses of both the Constitution of Louisiana and of the United States of America, in that the said laws under which the Bill of Information is founded is being enforced against them arbitrarily, capriciously and discriminately, in that it is being applied and administered unjustly and illegally, and only against persons of the Negro race and/or white

persons who act in concert with members of the Negro race.

3. That the statutes under which the prosecution is based and the Bill of Information founded thereon, are both so vague, indefinite and uncertain as not to establish an ascertainable standard of guilt.

4. That the statutes under which the prosecution is based, exceed the police power of the state, in that they have no real, substantial or rational relation to the public safety, health, moral, or general welfare, but have for their [fol. 10] purpose and object, governmentally sponsored and enforced separation of races, then, denying defendants their rights under the first, thirteenth and fourteenth Amendments to the United States Constitution, and Art. 1, Section 2 of the Louisiana Constitution.

5. That the Bill of Information on which the prosecution is based, does nothing more than set forth a conclusion of law, and does not state with certainty and sufficient clarity the nature of the accusation.

6. That the statutes deprive your defendants of equal protection of the law in that it excludes from its provisions a certain class of citizens namely those who at the time are active with others in furtherance of certain labor union activities.

7. That the refusal to give service solely because of race, the arrest and subsequent charge are all unconstitutional acts in violation of the Fourteenth Amendment of the United States Constitution, in that the act of the Company's representative was not the free will act of a private individual, but rather an act which was encouraged, fostered and promoted by state authority in support of a custom and policy of enforced segregation of race at lunch counters.

8. That the arrest, charge and prosecution of the defendants are unconstitutional, in that it is the result of state and municipal action, the practical effect of which is to encourage and foster discrimination by private parties.

Wherefore, the said defendants pray that this Motion to Quash be maintained and that the said Information be

declared null and void, and that they be discharged therefrom.

New Orleans, Louisiana, this 17 day of October, 1960.

Collins, Douglas & Elie, John P. Nelson Jr., By:  
Melis E. Elie.

*Duly sworn to by four defendants (jurats omitted in printing).*

[fol. 12]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

ANSWER TO MOTION TO QUASH—Filed November 3, 1960

Now into Court comes Robert J. Zibilich, Assistant District Attorney for the Parish of Orleans, and on behalf of the State answers the motion to quash filed by defendants herein as follows:

The State denies categorically that the statute under which the defendants are charged is unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United State of America and the Constitution of Louisiana, and further denies that the defendants are being deprived of their rights under the "equal protection and due process" clauses of the Constitution of the State of Louisiana and the Constitution of the United States of America.

The State further denies that the said law is being enforced against them arbitrarily, capriciously and discriminately, and further denies that the statute is so vague as to render it unconstitutional.

Wherefore, your respondent prays that this answer be deemed sufficient and that the matter be proceeded with according to law.

November 3, 1960.

Robert J. Zibilich, Assistant District Attorney, Parish of Orleans.

[fol. 13]

IN THE CRIMINAL DISTRICT COURT  
PARISH OF ORLEANS

[Title omitted]

**Transcript of Testimony on Motion to Quash—  
November 3, 1960**

Testimony taken in Open Court before the Honorable J. Bernard Cocke, Judge Presiding on the 3rd day of November, 1960, on the hearing on the Motion to Quash the Information in the above numbered and entitled cause.

**A P P E A R A N C E S :**

Robert J. Zibilich, Esq., Assistant District Attorney, For the State.

John P. Nelson, Esq., Lolis E. Elie, Esq., Nils Douglas, Esq., Attorneys for defendants Goldfinch, Lombard, Castle and Carter.

Reported by: Charles A. Neyrey, Official Court Reporter, Section "E".

[fol. 14]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: State ready?

Mr. Zibilich: State's ready.

Mr. Nelson: We are ready Your Honor.

The Court: Under what particular phase is it that you want to take up?

Mr. Nelson: The phase dealing strictly with the Motion to Quash and the Constitutional questions therein, and the purpose of this hearing is to introduce evidence in support of our Motion to Quash.

The Court: As I understand your contention, you claim it is the administration of this particular law which you say is unconstitutional because of its administration.

Mr. Nelson: That is one of the points Your Honor. There

is listed in our memorandum five major points of our Motion to Quash.

The Court: I won't permit you to take evidence on anything but that one point, and that is the only handling of the case on which any testimony will be taken.

Mr. Nelson: Yes, Your Honor.

The Court: You want to excuse Mr. Dowling?

Mr. Nelson: Yes sir and Captain Cutrera is excused also.

The Court: Proceed.

[fol. 15]

DELESSEPS STORY MORRISON, called as a witness for Mover, after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Nelson:

Q. What is your name please?

A. deLesseps S. Morrison.

Q. And Mr. Morrison you are presently the Mayor of the City of New Orleans?

A. Correct.

Q. In connection with your duties as Mayor are you also the Chief Law Enforcement officer?

A. The Superintendent of Police I would say is the chief law enforcement officer, but he serves under my direction, so I do have that responsibility.

Q. It is part of your duties to set policy for the police and to also encourage them to take certain action in any particular cases?

A. It is the policy of my office and that of the City government to set the line or direction of policy to the police department.

Q. In connection with your duties of Mayor—first, you were the Mayor during the month of September 1960?

A. Correct.

Q. How long have you been Mayor of the City of New Orleans?

A. Fourteen and a half years.

Q. Directing your attention to Friday, September 9th, do you recall an incident where they had a sit-in demonstration at the Woolworth Store in the city of New Orleans?

A. It was reported to me, yes.

Q. Now, I show you a copy of the Times-Picayune dated Tuesday morning, September 13th, 1960, Page 7 of Section 1 to where it says "Sit-in Out Mayor warns", and particularly a quote that is in red lines in that column and ask you [fol. 16] if you will kindly read it, not out loud but to yourself.

A. Correct.

Q. Is that an accurate report of the statement which you issued on that date?

A. It is.

Q. This report was issued as a result of what?

A. Well this was following the initial sit-in and follow-up demonstration the next day, I believe by picketing in the same area, and I outlined to the police department and the community the two acts of the Legislature 70 and 80 which dealt with this matter and gave the reasons in the public interest that we should carry out the intent and purpose of the law. Briefly that was it.

Mr. Nelson: In connection with the Mayor's testimony, would like to offer, introduce and file in evidence Page 7 of the Times-Picayune of Tuesday morning, September 13th, and mark it for identification as Defense-1.

Mr. Zibilich: No objection.

The Court: Let it be filed.

Examination (resumed).

By Mr. Nelson:

Q. To your knowledge do you know of any establishments in the City of New Orleans which, eating establishments, which caters to both negroes and white?

A. I would have no way of answering that, and I have to have personal knowledge in order to answer, and there are thousands of places in New Orleans and I could not speak for what they are doing each one of them.



Q. In your experience in traveling throughout the town, do you know of any establishments that serve both?

A. I haven't seen anywhere where they had mixed lunch [fol. 17] counters, but there are some that handle both negroes and whites at separate counters.

Q. But as far as negroes and whites eating at the same counter?

A. I have not seen any, but I repeat that I have to testify of my own personal knowledge.

Q. And you have not seen any that served both at the same counter anywhere in this city?

A. I have not.

Q. Referring to sit-in demonstrations in your report, you are referring to sit-in demonstrations of the type that were performed in the Woolworth Department Store in this city?

A. Yes sir.

Q. And sit-ins of a similar nature?

A. That is correct.

Q. I have no further questions.

By Mr. Elie:

Q. In answer to counsel's questions you stated that with reference to acts 70 and 80 of the 1960 Legislature, you say that the intent or was—you say that the intent you made reference to, to the intent and purpose of those acts?

A. Right.

Q. In your opinion would you say the intent and purpose was to prevent Negroes from—

The Court: I will determine myself as to what the intent and purpose of the Acts were. That is a question of law.

Mr. Elie: I submit that as chief legal officer, the opinion of the Mayor as regards—

The Court: That is correct with reference to any instructions directed to the Police Department. You have a right to draw whatever inferences from that in connection with [fol. 18] the testimony given, but in the long run I will decide what the intent and purpose of the law is.

Cross examination.

By Mr. Zabilich:

Q. In your releases to the press concerning alleged sit-in demonstrations at Woolworth, did you make any references whatsoever to Revised Statutes 14:59? Did you make any references to the criminal mischief law of the State?

A. I was, in the connection—

Q. You may explain your answer.

A. My statement did encompass any laws covering questions of disturbing the peace, of public acts which would create a disturbance or confusion, disturbances of the peace, and I specifically quoted these two acts because they are of recent nature and somewhat specific in regard to the question, but I have a feeling that matters of this kind, when persons engage in this type of demonstration, this type of activity as a natural consequence will create disturbances of the peace and in many cases set off chain reactions that can be much more serious.

Redirect examination.

By Mr. Elie:

Q. Did you receive any advice from anyone, any legal advice—

Mr. Zibilich: I object.

The Court: The Mayor is a lawyer, and one of the best.

The Mayor: Thank you Judge, but I'm not that good.

[fol 19] JOSEPH I. GIARRUSSO, a witness for Mover, after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Nelson:

Q. What is your full name?

A. Joseph I. Giarrusso.

Q. What is your present occupation Mr. Giarrusso?

A. Superintendent of Police.

Q. Of the City of New Orleans?

A. Yes sir.

Q. Were you so employed during the month of September of 1960?

A. Yes sir.

Q. You recall Mr. Giarrusso an incident involving a sit-in demonstration in Woolworth's on September 9th, 1960?

A. Yes sir.

Q. In connection with that sit-in demonstration did you on September 10th, do you recall issuing a statement to the public generally, do you recall issuing a statement?

A. Yes sir.

Q. In that connection I show you a copy of the Saturday morning Times-Picayune dated September 10th, and direct your attention to Page 18 Section 1, and what purports to be a quote from you. Would you kindly read that within the red lines, (complies) Superintendent Giarrusso, is that an accurate report of the statement you issued following the sit-in demonstration, following the Woolworth sit-in demonstration?

A. Yes sir.

Q. And this statement, what was the reason for the issuance of this statement, Superintendent?

A. The reason for it. As the statement says I was hoping that situations of this kind would not come up in the future [fol. 20] to provoke any disorder of any kind in the community.

Q. I gather the situation you refer to are situations such as at the Woolworth's Store and similar establishments?

A. That is right.

Mr. Nelson: Like to offer, introduce and file in evidence, Page 18, Section 1 of the Times-Picayune dated September 10th, and mark same Defense 2.

Mr. Zibilich: No objection.

The Court: Let it be filed.

## Examination (resumed).

By Mr. Nelson:

Q. How long have you been a member of the New Orleans Police Department?

A. Going on fifteen years.

Q. In your experience as a member of the New Orleans Police Department, and a resident of the city of New Orleans, do you know of any public establishments that cater to both Negroes and whites at the same lunch counters in the city of New Orleans?

Mr. Zibilich: I object. I don't know whether it is relevant.

The Court: I am going to permit the answer. The objection is overruled.

A. No, sir, I do not.

Mr. Zibilich: No questions.

---

[fol. 21] MR. WENDELL BARRETT, a witness for Mover, after first being duly sworn by the Minute Clerk, testified as follows:

## Direct examination.

By Mr. Nelson:—

Q. Your full name please?

A. Wendell Barrett.

Q. What is your present address?

A. 4934 Reed Boulevard.

Q. Is that in the City of New Orleans?

A. New Orleans 27.

Q. Your present occupation?

A. Manager of McCrory's 5 and 10 Cents Store.

Q. How long have you been manager?

A. In this store?

Q. Yes.

A. Three years, almost 2½ to 3 years.

Q. What type of store is McCrory's?

A. Store made up of individual departments.

Q. That caters to the general public?

A. That caters to the general public.

Q. What do they sell?

A. Well each thing?

The Court: Everything but drugs and the drug store sells everything else.

A. Drugs too. Your Honor.

Examination (resumed).

By Mr. Nelson:

Q. Were you ever manager of any other McCrory's stores?

A. Savannah, Georgia and Valdesta, Georgia.

Q. And also New Orleans?

A. Yes, sir.

Q. McCrory's Store here, in New Orleans, is that part of a national chain?

[fol. 22] A. It is.

Q. What is the name of the National chain?

A. McCrory Stores Incorporated.

Q. And in approximately how many states does it operate?

A. Approximately 34 states.

Q. Mr. Barrett, what is the general policy of McCrory Stores Inc. relative to segregated lunch counters?

Mr. Zibilich: I am going to object to any further questioning along these lines. The purpose for this testimony is in connection with the Motion to Quash wherein it is alleged that the administration of the law by certain law enforcement officials is unconstitutional. Mr. Barrett by his own testimony is not a member of the New Orleans Police Department and is also not a member of any other law enforcement agency.

The Court: I am going to overrule the objection as to what the policy is of McCrory's Stores Incorporated. We are not interested in what they do in California and Con-

needful or anywhere else. There may be a general policy but confine ourselves to what is the policy of this particular store within this particular jurisdiction. So with that explanation the objection is overruled.

Mr. Nelson: Then I can ask that question?

The Court: I am not going to permit the general policy of McCrory's as it might effect the other 34 states to go into this record, because the only thing we are interested in is the policy in this particular store. That policy may be dictated nationally, that may be true, but I'm not interested in what the other 33 states do.

Mr. Nelson: Before I take my bill I want to be sure that [fol. 23] I remember the question exactly.

The Court: Read the question.

The Reporter: "Question: Mr. Barrett, what is the general policy of McCrory Stores Inc. relative to segregated lunch counters?"

Mr. Nelson: I understand that the court sustains the objection.

The Court: I overrule the objection, but I won't permit or rather I want you to limit your question as to the policy as it relates to the store in this jurisdiction. There may be a national policy, but how can it effect this store, in this city in its operations. Ask him what the policy is of this store and then it might lead to the national policy.

Mr. Nelson: Before I get off the question, the purpose of that question is the local policy is dependent on the national policy. It was strictly for convenience.

The Court: I come back to the same proposition. Ask him about the local policy and see if there is any necessity to go into the national policy.

Mr. Nelson: Respectfully object and reserve a bill of exceptions making part of the bill, the question, the court's ruling and the comments of the court.

The Court: Let the record show that the ruling of the court is that your general question, that I am limiting you at this time—I overruled the objection of the state, but suggested that you confine yourself as to the policy that effected the local store. It may be that after this witness [fol. 24] answers that I may allow you to go into the

national policy, but at this time I am not interested in the national policy.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Barrett, what is the policy of McCrory's relative to segregation of lunch counters here in New Orleans?

A. The policy is determined by local tradition, law and custom, as interpreted by me.

By the Court:

Q. Who makes that decision?

A. Interpreted by me.

Q. By you?

A. Yes sir.

Examination (resumed).

By Mr. Nelson:

Q. Who gives—who sets the standard by which you are to judge and what you base your decision on, that comes from the national office?

A. I am appointed store manager of this store in this city.

By the Court:

Q. He wants to know is does the national office of your concern permit you to determine who, are rather how, you should operate that particular store in connection with the tradition, laws and customs of the community in which the store is located?

A. I do. I would answer yes.

By Mr. Nelson:

Q. Have you ever been employed in any McCrory's store that was desegregated?

A. No I haven't.

Q. Do you know the procedure McCrory's follows before they desegregate any particular lunch counter in any particular town?

Mr. Zibilich: I object Your Honor. We are only interested in what is here.

The Court: Objection sustained.

[fol. 25] Mr. Nelson: Reserve a bill making the question, answer and ruling of the court part of the bill.

The Court: I want the record again to show, so there will be no confusion. My appreciation of this gentleman's response was that locally he had the right, he was permitted, that he established the policy of the store based upon custom, law and—what was the word?

A. Tradition.

—tradition. The next question was whether or not he had that power from a national standpoint to determine for himself here how he should operate the store and he stated he had. We are not interested in what happened in Connecticut or any other place.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Barrett, the management of McCrory's Inc., have the authority to desegregate these counters, overruling your personal opinion—

Mr. Zibilich: Object Your Honor.

The Court: The objection is well taken.

Mr. Nelson: Reserve a bill of exception making the question and the ruling of the court part of the bill.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Barrett, have you sir in the last 30 days to 60 days entered into any conference with other department store managers here in New Orleans relative to sit-in problems?

A. I don't know what you mean by conferences.



Q. Discussions with them?

A. We have spoken of it, yes.

Q. Have you discussed methods and means to handle [fol. 26] these situations if they arise in any particular department store?

Mr. Zibilich: Renew my original objection.

The Court: The objection is well taken. I won't permit you to go any further. You can dictate into the record what you want to ask of this witness.

Mr. Nelson: Respectfully object and reserve a bill of exceptions making the question, the objection and the ruling of the court as part of the bill.

Mr. Nelson: The purpose of this Your Honor is a question of conformity with state policy.

The Court: The man already said that he had the right to determine the policy based on tradition, custom and the laws of the community. Is that going to affect me in the slightest that he had a meeting with the manager of D. H. Holmes or Godchaux or anybody else, and I don't see the relevancy of it at all. You have established the policy of this store and the policy nationally dictated giving him the discretion. What more do you want?

By Mr. Nelson:

Q. Mr. Barrett, have you ever met with members of the New Orleans Police Department and discussed problems of sit-in demonstrations and how you or how they should be handled if they arise in your store?

Mr. Zibilich: Object.

The Court: Same ruling.

Mr. Nelson: Respectfully object and reserve a bill of exception, making the question, the objection and the ruling of the court part of the bill.

[fol. 27] By Mr. Nelson:

Q. Now Mr. Barrett, would you kindly tell the court the plan or procedure that your store uses here in the city when sit-in demonstrations take place?

Mr. Zibilich: Same objection.

The Court: Same ruling.

Mr. Nelson: Respectfully object and reserve a bill of exception making the question, objection and the ruling of the court part of the bill.

Examination (resumed).

By Mr. Nelson:

Q. Do you have a plan that your employees are aware of which is to go into effect if there is a sit-in demonstration in your store?

Mr. Zibilich: Same objection.

The Court: Same ruling.

Mr. Nelson: Reserve a bill making the question, objection and ruling of the court part of the bill.

Examination (resumed).

By Mr. Nelson:

Q. Now in your sit-in demonstration, when it took place in your store, it involved some Negroes did it not?

A. Yes sir.

Q. And I'm talking now about the sit-in demonstration that took place on September 17th?

A. Yes sir.

Q. Were you in the store?

A. Yes sir.

Q. Now there was also one white person involved in this was there not?

A. Yes sir.

Q. If these persons would have been white all of them, [fol. 28] would they have been given service at that particular lunch counter on that particular day?

Mr. Zibilich: Objection.

The Court: The objection is well taken.

Mr. Nelson: Reserve a bill making the objection, the question, and the ruling of the court part of the bill.

Examination (resumed).

By Mr. Nelson:

Q. Did these people that came into your store on the 17th, of September, involved in the sit-in demonstration, were they well dressed?

Mr. Zibilich: Same objection.

The Court: Same ruling.

Mr. Nelson: Same bill of exception, making the question, objection and ruling of the court part of the bill.

The Court: Might I say again to explain my ruling. As long as this gentleman had the discretion that he admitted he had, both locally as well as the approval of his national organization, the question then becomes a question of law, whether that discretion that he said he had, without regard to how he used it, if he had that discretion and had a right to use it, out of the window goes the rest. If he didn't have it because of the 14th Amendment to the Constitution or any other amendment, your point of law is good then.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Barrett, I understand you exercise that discretion and it conforms to state policy and practice and custom in this area, is that right sir?

A. Yes sir.

[fol. 29] Examination (resumed).

By Mr. Nelson:

Q. And if the state policy or practice would be different you would exercise your discretion in a different manner?

Mr. Zibilich: Objection.

The Court: Objection sustained. If he had that discretion he had a right to change it at any time, if he had that right. You have proved that abundantly.

Mr. Nelson: Reserve a bill of exception, making the question, the objection, and the ruling of the court part of the bill.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Barrett, if there was no custom of segregated lunch counters or no state policy, the general atmosphere would be different, would you allow Negroes to eat at white lunch counters?

Mr. Zibilich: Same objection.

The Court: Same ruling.

Mr. Nelson: The same bill of exception.

I have no further questions.

Cross examination.

By Mr. Zibilich:

Q. Mr. Barrett, are you a police officer?

A. No sir.

Q. I have no other questions.

[fol. 30] Mr. Nelson: Your Honor, in connection with this case I would like to offer into evidence, I believe that the court can take judicial notice, but out of an abundance of caution I would like to offer the following:

House bills of the Louisiana Legislature of 1960, House bills 343 through 366, which bills were all introduced by Representatives Fields, Lyman and Triche and to be specific Numbers 343, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 360, 61, 62, 63, 64, 65, 66. All of which bills did not pass, but they are in the Journal, Legislature Journal and I make them part of my record.

Mr. Zibilich: No objection.

Mr. Nelson: And I'm sure that the court can take judicial notice of these.

The Court: Those that passed I am sure, but the others I don't know.

Mr. Nelson: Like to make part of the record those specific bills in question.

The Court: Let it be filed.

Mr. Nelson: Specifically the Court can take judicial cognizance of the Acts setting up the Louisiana State Sovereignty Commission and what their policy and procedures have been, and I am sure that the Court can take judicial notice of that but I point it out to the court specifically.

The Court: You may offer or call to the court's attention the things you think are important.

[fol. 31] Mr. Nelson: One last thing. The house bills, the ones that were specifically passed, which are in the advance sheets of the West Publication and they are acts, —it is not necessary to go into them by number, but—

The Court: If you have the numbers give them.

Mr. Nelson: Acts 69, 73, 77, 78, 79, 70, 76, 81 and 68. Those are the acts, which amend the criminal statutes, relative we submit to the sit-in demonstrations and that is our case.

The Court: That concludes your evidence.

Proceed to the arguments.

Mr. Nelson: I submit it.

Mr. Zibilich: State will submit it.

The Court: Let the minute entry show that the matter on the motion to quash has been submitted.

The defendants are discharged on their bonds until again notified.

[fol. 32]

IN THE CRIMINAL DISTRICT COURT  
PARISH OF ORLEANS

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STATE OF LOUISIANA

VERSUS

SIDNEY L. GOLDFINCH, JR., ET AL.

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JUDGMENT ON MOTION TO QUASH—November 28, 1960

The defendants, Rudolph Lombard, a colored male, Oretha Castle, a colored female, Cecil Carter, Jr., a colored male, and Sydney L. Goldfinch, Jr., a white male, are jointly charged in a bill of information which reads as follows:

“ \* \* \* that on the 17th of September, 1960, each did wilfully, unlawfully and intentionally take temporary possession of the lunch counter and restaurant of McCrory's Store, a corporation authorized to do business in the State of Louisiana, located at 1005 Canal Street, and did wilfully, unlawfully and intentionally remain in and at the lunch counter and restaurant in said place of business after Wendell Barrett the manager, a person in charge of said business, had ordered the said Sydney Langston Goldfinch, Jr., Rudolph Joseph Lombard, Oretha Castle and Cecil Winston Carter, Jr., to leave the premises of said lunch counter and restaurant, and to desist from the temporary possession of same, contrary, etc.”

The particular statute under which defendants are charged is L.S.A.-R.S. 14:59 (6) which reads as follows:—

“Criminal mischief is the intentional performance of any of the following acts: \* \* \*

“(6) taking temporary possession of any part or parts of a place of business, or remaining in a place of

business after the person in charge of said business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

The defendants moved the Court to quash the bill of information.

As cause for quashing the bill, defendants alleged "that movers were deprived of the due process of law and equal protection of law guaranteed by the Constitution and laws of the State of Louisiana and of the United States of America as follows:"

[fol. 33] "(1) That the statutes under which the defendants are charged are unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United States of America, and in contravention of the Constitution of the State of Louisiana, in that they were enacted for the specific purpose and intent to implement and further the states policy of enforced segregation of races."

"(2) That the said defendants are being deprived of their rights under the "equal protection and due process" clauses of both the Constitution of Louisiana and of the United States of America in that the said laws under which the bill of Information is being enforced against them arbitrarily, capriciously and discriminately, in that it is being applied and administered unjustly and only against persons of the Negro race and/or white persons who act in concert with members of the Negro race."

"(3) That the statutes under which the prosecution is based and the Bill of Information founded thereon, are both so vague, indefinite and uncertain as not to establish an ascertainable standard of guilt."

"(4) That the statutes under which the prosecution is based, exceed the police power of the state in that they have no real, substantial or rational relation to the public safety, health, morals, or general welfare, but

have for their purpose and object, governmentally sponsored and enforced separation of races, thus, denying the defendants their rights under the first, thirteenth and fourteenth Amendment to the United States Constitution and art. 1 Section 2 of the Louisiana Constitution.'

"(5) That the bill of information on which the prosecution is based, does nothing more than set forth a conclusion of law, and does not state with certainty and sufficient clarity the nature of the accusation.'

"(6) That the statutes deprive your defendants of equal protection of the law in that it excludes from its provisions a certain class of citizen, namely those who are at the time active with others in furtherance of certain union activities.'

"(7) That the refusal to give service because of race, the arrest and subsequent charge are all unconstitutional acts in violation of the Fourteenth Amendment of the United States Constitution in that the act of the Company's representative was not the free will act of a private citizen but rather an act which was encouraged, fostered and promoted by state authority in support of a custom and policy of enforced segregation of races at lunch counters.'

"(8) That the arrest, charge and prosecution of defendants are unconstitutional, in that it is the result of state and Municipal action, the practical effect of which is to encourage and foster discrimination by private parties."

In support of their motion to quash, the defendants offered the testimony of the following named witnesses, deLesseps S. Morrison, Mayor of the City of New Orleans, Joseph I. Giarrusso, Superintendent of Police, and Wendell [fol. 34] Barrett, Manager of McCrory's 5 and 10 Cents Store.



The Mayor testified in substance as follows:

That the Superintendent of Police serves under his direction; that he and the City Government "set the lines or direction of policy to the police department".

That a statement appearing in the Times-Picayune dated September 13, 1960, page 7 of Section 1, was an accurate report of a statement issued by him following the initial "sit-in" and follow up demonstration at the F. W. Woolworth Store on September 9, 1960.

The essence of the Mayor's statement filed in evidence was, that he had directed the superintendent of police not to permit any additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers; that it was his determination that the community interest, the public safety, and the economic welfare of the city required that such demonstrations cease and that they be prohibited by the police department.

The Mayor further testified:

That he did not know of any places in the City of New Orleans, where whites and negroes were served at the same lunch counter.

The Superintendent of Police identified as accurate a statement of his appearing in the Times-Picayune, Page 18, Section 1, dated September 10, 1960; that his reason for issuing the statement was that a recurrence of the sit-in demonstration as had occurred at the Woolworth Store on September 9, 1960, would provoke disorder in the community.

In his statement, the Superintendent of Police, made known that his department was prepared to take prompt and effective action against any person or group who disturbed the peace or created disorders on public or private property. He also exhorted the parents of both white and negro students who participated in the Woolworth Store "sit-in" demonstration to urge upon these young people that such actions were not in the community interest; etc.

[fol. 35] He further testified that as a resident of the City of New Orleans and as a member of the police de-

partment for 15 years, he did not know of any public establishment that catered to both white and negro at the same lunch counter.

Mr. Wendell Barrett testified, that he was and had been the Manager of McCrory's 5 and 10 Cents Store in the City of New Orleans for about 3 years; that the store was made up of individual departments, and catered to the general public.

That the policy of McCrory's national organization as to segregated lunch counters, was to permit the local manager discretion to determine same, consideration being had for local tradition, customs and law, as interpreted by the local manager; that in conformity with this policy, he determined whether lunch counters in the local McCrory's store would be segregated or not.

That on September 17th., 1960, there was a "sit-in" demonstration in the local store of McCrory's, involving one white man and some negroes; that he was in the store at the time.

At the conclusion of the testimony of this witness, the defendants offered in evidence, "House bills of the Louisiana Legislature of 1960, 343 through 366, which bills were all introduced by Representatives Fields, Lehrman and Triche, and to be specific Numbers 343, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 360, 61, 62, 63, 64, 65, 66. All of which bills did not pass, but they are in the Journal. Also introduced and received in evidence were Acts 69, 73, 77, 78, 79, 70, 76, 81 and 68.

The motion to quash was submitted without argument.

A consideration of defendants' motion to quash, as well as the factual presentation on the hearing thereof, discloses defendants' position to be, that the enactment of L.S.A.-R.S. 14:59(6) by the Louisiana Legislature of 1960, was part of a "package deal", wherein, and with specific [fol. 36] purpose and intent, that body sought to implement and further the state's policy of enforced segregation of the races.

In addition, the same pleading and factual presentation, was offered by defendants' to support their contention, that L.S.A.-R.S. 14:59(6), was enforced against them arbitrarily, capriciously and discriminately in that it was be-

ing applied and administered unjustly and illegally, and only against persons of the negro race, and/or white persons who acted in concert with members of the Negro race.

The courts have universally subscribed to the doctrine contained in the following citations:

*Presumptions and Construction in Favor of Constitutionality*

"The constitutionality of every statute is presumed, and it is the duty of the court to uphold a statute wherever possible and every consideration of public need and public policy upon which Legislature could rationally have based legislation should be weighed by the court, and, if statute is not clearly arbitrary, unreasonable and capricious it should be upheld as constitutional."

State vs. Rones, 67 So. 2d. 99, 223 La. 839.

Michon vs. La. State Board of Optometry Examiners, 121 So. 2d. 565.

"The constitutionality of a statute is presumed and the burden of proof is on the litigant, who asserts to the contrary, to point out with utmost clarity wherein the constitution of the state or nation has been offended by the terms of the statute attacked."

Olivedell Planting Co. v. Town of Lake Providence, 47 So. 2d. 23, 217 La. 621.

"Presumption is in favor of constitutionality of a statute, and statute will not be adjudged invalid unless its unconstitutionality is clear, complete and unmistakable."

State ex rel Porterie v. Grosjean, 161 So. 871, 182 La. 298.

"The courts will not declare an act of the legislature unconstitutional unless it is shown that it clearly violates terms of articles of constitution."

Jones v. State Board of Ed. 53 So. 2d. 792, 219 La. 630.

[fol. 37] "A legislative act is presumed to be legal until it is shown that it is manifestly unconstitutional.

and all doubts as to the validity are resolved in favor its constitutionality."

"The rule that a legislative act is presumed to be legal until it is shown to be manifestly unconstitutional is strictly observed where legislature has enacted a law in exercise of its police powers."

Board of Barber Examiners of La. v. Parker, 182 So. 485, 190 La. 314.

"Where a statute is attacked for discrimination or unreasonable classification doubts are resolved in its favor and it is presumed that the Legislature acts from proper motives in classifying for legislative purposes, and its classification will not be disturbed unless it is manifestly arbitrary and invalid."

State vs. Winchall & Rosenthal, 86 So. 781, 147 La. 781, Writ of Error dismissed (1922). Winchall & Rosenthal of State Louisiana, 42 S. Ct. 313, 258 U. S. 605, 66 L. Ed. 786.

"In testing validity of a statute the good faith on part of Legislature is always presumed."

State vs. Saia, 33 So. 2d. 665, 212 La. 868.

"There is strong presumption Legislature understands and appreciates needs of people, and that its discriminations are based on adequate grounds."

Festervand v. Lester, 130 So. 635, 15 La. App. 159.

"A statute involving governmental matters will be construed more liberally in favor of its constitutionality than one affecting private interests."

State ex rel LaBauve v. Mitchel, 46 So. 430, 121 La. 374.

"State is not presumed to act arbitrarily in exercising police power."

State ex rel Porterie, Atty. Gen. v. Walmsley, 162 So. 826, 183 La. 139, Appeal dismissed Board of Liquidation v. Board of Com'rs. of Port of New Orleans, 56 S. Ct. 141, 296 U. S. 540, 80 L. Ed. 384, rehearing denied Board of Liquidation, City Debt of New Orleans v. Board of Com'rs.

of Port of New Orleans, 56 S. Ct. 246, 296, U. S. 663, 80 L. Ed. 473.

"Where a law is enacted under exercise or pretended exercise of police power and appears upon its face to be reasonable, burden is upon party assailing such law to establish that its provisions are so arbitrarily and unreasonable as to bring it within prohibition of Fourteenth Amendment, U.S.C.A. Const. Amend. 14".

State vs. Saia, 33 So. 2d 665, 212 La. 868.

[fol. 38] "Act of Legislature is presumed to be legal, and the judiciary is without right to declare it unconstitutional unless that is manifest, and such rule is strictly observed in cases involving laws enacted in the exercise of the state's police power."

Schwegmann Bros. v. Louisiana Bd. of Alcohol Beverage Control, 43 So. 2d. 248, 216 La. 148, 14 A. L. R. 2d. 680.

*L.S.A.-R.S. 14:59 (6) Under Which the Prosecution Is Based and the Bill of Information Founded Thereon, Are So Vague, Indefinite and Uncertain as Not to Establish an Ascertainable Standard of Guilt?*

Defendants' above stated complaint is without merit. L.S.A.-R.S. 14:59 (6) under which defendants are charged reads as follows:

"Criminal mischief is the intentional performance of any of the following acts: \* \* \*

(6) "Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of said business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

The bill of information alleges:

"\* \* \* that on the 17th. of September, 1960, each did wilfully, unlawfully and intentionally take temporary possession of the lunch counter and restaurant of

McCrory's Store, a corporation authorized to do business in the State of Louisiana, located at 1005 Canal Street, and did wilfully, unlawfully and intentionally remain in and at the lunch counter and restaurant in said place of business after Wendell Barrett the manager, a person in charge of said business, had ordered the said Sydney Langston Goldfinch, Jr., Rudolph Joseph Lombard, Oretta Castle and Cecil Winston Carter, Jr., to leave the premises of said lunch counter and restaurant and to desist from the temporary possession of same, contrary, etc."

From the foregoing it will be seen that L.S.A.-R.S. 14:59 (6) as well as the bill of information filed thereunder, meet the constitutional rule governing the situation.

[fol. 39] "~~When the meaning of a statute appears doubtful it is well recognized that we should seek the discovery of the legislative intent. However, when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for construction.~~"

State v. Marsh, et al., 96 So. 2d. 643, 233 La. 388.

State v. Arkansas Louisiana Gas Co., 78 So. 2d. 825, 227 La. 179.

"Meaning of statute must be sought in the language employed, and if such language be plain it is the duty of courts to enforce the law as written."

State ex rel LeBlanc v. Democratic Central Committee, 86 So. 2d. 492, 229 La. 556.

Texas Co. v. Cooper, 107 So. 2d. 676, 236 La. 380.

Beta Xi Chapter, etc. v. City of N. O., 137 So. 204, 18 La. App. 130.

Ramey v. Cudahy Packing Co., 200 So. 333.

"Statute, which describes indecent behaviour with juveniles as commission by anyone over 17, of any lewd or lascivious act upon person or in presence of any child under age of 17, with intention of arousing or gratifying sexual desires of either person, which states that lack of knowledge of child's age shall not be a

defense, and which provides penalty therefor, sufficiently describes acts which constitute violation of statute and therefore, is constitutional. L.S.A.-R.S. 14:81."

State v. Milford, 73 So. 2d. 778, 225 La. 611.

State v. Saibold, 213 La. 415, 34 So. 2d. 909.

State v. Prejean, 216 La. 1072, 45 So. 2d. 627.

"The statute defining the crime of simple escape from 'lawful custody' of official of state penitentiary or from any 'place where lawfully detained' uses the quoted words in their common or ordinary meanings and is not violative of state or federal constitutions in failing to define the terms. L.S.A.-R.S. 14:110, L.S.A.-Const. Art. 1, Sec. 10; U.S.C.A.-Const. Amend. 14."

State v. Marsh, 96 So. 2d. 643, 233 La. 388.

L.S.A.-R.S. 15:227 provides:

"The indictment must state every fact and circumstance necessary to constitute the offense, but it need do no more, and it is immaterial whether the language of the statute creating the offense, or words unequivocally conveying the meaning of the statute is used."

"Information charging defendant violated a specific statute in that he entered without authority a described structure, the property of a named person, with the intent to commit a theft therein, set forth each and every element of the crime of simple burglary and fully informed accused of the accusation of the nature [fol. 40] and cause of the accusation, and therefore, was sufficient."

State v. McCrory, 112 So. 2d. 432, 237 La. 747.

"Where affidavit charged defendant with selling beer to minors under 18 years of age in the language of the statute, and set all the facts and circumstances surrounding the alleged offense, so that court was fully informed of the offense charged for the proper regulation of evidence sought to be introduced, and the accused was informed of the nature and cause of the



accusation against her, and affidavit was sufficient to support a plea of former jeopardy, affidavit was sufficient to charge offense."

State v. Emmerson, 98 So. 2d. 225, 233 La. 885.

State v. Richardson, 56 So. 2d 568, 220 La. 338.

L.S.A.-R.S. 14:59(6) upon which this prosecution is based is sufficient in its terms to notify all who may fall under its provisions as to what acts constitute a violation of the law, and the bill of information meets fully the requirements of the law.

*The Bill of Information on Which the Prosecution Is Based, Does Nothing More Than Set Forth a Conclusion of Law, and Does Not State With Certainty and Sufficient Clarity the Nature of the Accusation?*

There is no merit to this contention.

As has been heretofore shown, the bill of information states "facts and circumstances" in compliance with the Constitutional mandate, L.S.A.-R.S. 15:227, and the decisions of the Supreme Court. The words used in describing the offense are those of L.S.A.-R.S. 14:59(6), and are not conclusions of law by pleader.

"Information for taking excess amount of gas from well held not to state mere conclusions, where showing amount allowed and amount taken. Act No. 252, of 1924, sec. 4, subd. 2."

State v. Carson Carbon Co., 111 So. 162, 162 La. 781.

[fol. 41]

*L.S.A.-R.S. 14:59 (6) Deprives Defendants of Equal Protection of the Law in That It Excludes From Its Provisions of a Certain Class of Citizens, Namely Those Who at the Time Are Active With Others in Furtherance of Certain Union (Labor) Activities?*

The court is unable to relate this contention to the provisions of L.S.A.-R.S. 14:59(6), or the bill of information filed thereunder.

No where in the statute is any reference made to labor union activities, nor does the statute make any exceptions



or exclusions as to any persons or class of citizens, labor unions, or otherwise. It is probable that defendants have erroneously confused these proceedings with a charge under L.S.A.-R.S. 14:103 (Disturbance of the Peace.)

*The Defendants Are Being Deprived of Their Rights Under the "Equal Protection and Due Process" Clauses of Both the Constitution of Louisiana and of the United States of America, in That the Said Law Under Which the Bill of Information Is Founded Is Being Enforced Against Them Arbitrarily, Capriciously and Discriminately, in That It Is Being Applied and Administered Unjustly and Illegally, and Only Against Persons of the Negro Race and/or White Persons Who Act in Concert With Members of the Negro Race?*

The prosecution of defendants is in the name of the State of Louisiana, through the District Attorney for the Parish of Orleans. This officer is vested with absolute discretion as is provided by L.S.A.-R.S. 15:17.

It reads as follows:

"The district attorney shall have entire charge and control of every criminal prosecution instituted or pending in any parish wherein he is district attorney, and shall determine whom, when, and how he shall prosecute, etc."

In the case of State v. Jourdain, 74 So. 2d. 203, 225 La. 1030, it was claimed in a motion to quash that the narcotic law was being administered by the New Orleans Police Department and the District Attorney's Office in a manner calculated to deprive the defendant of the equal protection [fol. 42] of the law, and in violation of Section 1 of the 14th. Amendment of the Constitution of the United States, in that these officials were actively prosecuting the infraction in this case, whereas they refrained from prosecuting other violations of the narcotic act of a more serious nature.

In sustaining the trial court's ruling, Your Honors said:

"The claim is untenable. Seemingly, it is the thought of counsel that the failure of the Police Department and the District Attorney to offer appellant immunity,

if he would become an informer, operates as a purposeful discrimination against him and thus denies him an equal protection of the law. But, if we conceded that the police and the district attorney have failed to prosecute law violators who have agreed to become informers, this does not either constitute an unlawful administration of the statute or evidence an intentional or purposeful discrimination against appellant. The matter of the prosecution of any criminal case is within the entire control of the district attorney (R.S. 15:17) and the fact that not every violator has been prosecuted is of no concern of appellant, in the absence of an allegation that he is a member of a class being prosecuted solely because of race, religion, color or the like, or that he alone is the only person who has been prosecuted under the statute. Without such charges his claim cannot come within that class of unconstitutional discrimination which was found to exist in *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 and *McFarland v. American Sugar Ref. Co.*, 241 U. S. 79, 60 L. Ed. 899, 36 S. Ct. 498. See *Snowden v. Hughes*, 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397, and cases there cited."

[fol. 43] In the case of *City of New Orleans versus Dan Levy, et. al.*, 233 La. 844, 98 So. 2d. 210, Justice McCaleb in concurring stated:

"I cannot agree that the City of New Orleans and the Vieux Carre Commission are or have been applying the ordinances involved with "an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances" (see *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 1073, 30 L. Ed. 220) and have thus denied to appellant an equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution."

The sum and substance of appellant's charges is that his constitutional rights have been violated since many other similar or more severe violations of the

city ordinances exist and that the city officials have permitted such violations by not taking any action to enforce the law. These complaints, even if established, would not be sufficient in my opinion to constitute an unconstitutional denial of equal protection to appellant as it is the well-settled rule of the Supreme Court of the United States and all other state courts of last resort that the constitutional prohibition embodied in the equal protection clause applies only to discriminations which are shown to be of an intentional, purposeful, or systematic nature. *Snowden v. Hughes*, 321 U. S. 1, 9, 64 S. Ct. 397, 88 L. Ed. 497, 503; *Charleston Federal Savings & Loan Ass'n. v. Alderson*, 324 U. S. 182, 65 S. Ct. 624, 89 L. Ed. 857; *City of Omaha v. Lewis & Smith Drug Co.*, 156 Neb. 650, 57 N. W. 2d. 269; *Zorach v. Clauson*, 303 N. Y. 161, 100 N. E. 2d. 463; 12 Am. Jur. Section 566 and *State v. Anderson*, 206 La. 986, 20 So. 2d. 288.

In *State v. Anderson*, this court quoted at length from the leading case of *Snowden v. Hughes*, supra, (321 U. S. 1, 9, 64 S. Ct. 401) where the Supreme Court of the United States expressed at some length the criteria to be used in determining whether an ordinance or statute, which is claimed to have been unequally administered, transgresses constitutional rights. The Supreme Court said:

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, cf. *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 86, 87, 36 S. Ct. 498, 501, 60 L. Ed. 899 (1904), or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself. *Yick Wo v. Hopkins*, 118 U. S. 356, 373, 374, 6 S. Ct.

1064, 1072, 1073, 30 L. Ed. 220 (227, 228). But a discriminatory purpose is not presumed. *Tarrance v. State of Florida*, 188 U. S. 519, 520, 23 S. Ct. 402, 403, 47 L. Ed. 572 (573); there must be a showing of 'clear and intentional discrimination', *Gundling v. City of Chicago*, 177 U. S. 183, 186, 20 S. Ct. 633, 635, 44 L. Ed. 725 (728); see *Ah Sin v. Wittman*, 198 U. S. 500, 507, 508, 25 S. Ct. 756, 758, 759, 49 L. Ed. 1142 (1145, 1146); *Bailey v. State of Alabama*, 219 U. S. 219, 231, 31 S. Ct. 145, 147, 55 L. Ed. 191 [fol. 44] (197). Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. *Neal v. State of Delaware*, 103 U. S. 370, 394, 397, 26 L. Ed. 567 (573, 574); *Norris v. State of Alabama*, 294 U. S. 587, 589k, 55 S. Ct. 579, 580, 79 L. Ed. 1074 (1076); *Pierre v. State of Louisiana*, 306 U. S. 354, 357, 59 S. Ct. 536, 538, 83 L. Ed. 757 (759); *Smith v. State of Texas*, 311 U. S. 128, 130, 131, 61 S. Ct. 164, 165, 85 L. Ed. 84 (86, 87); *Hill v. State of Texas*, 316 U. S. 400, 404, 62 S. Ct. 1159, 1161, 86 L. Ed. 1559 (1562). But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race. *State of Va. v. Rives*, 100 U. S. 313, 322, 323, 25 L. Ed. 667 (670, 671); *Martin v. State of Texas*, 200 U. S. 316, 320, 321, 26 S. Ct. 338, 339, 50 L. Ed. 497 (499); *Thomas v. State of Texas*, 212 U. S. 278, 282, 29 S. Ct. 393, 394, 53 L. Ed. 512 (514); cf. *Williams v. State of Mississippi*, 170 U. S. 213, 225, 18 S. Ct. 583, 588, 42 L. Ed. 1012 (1016).

"Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination which may be evidenced, for example, by a systematic under-valuation

of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of the law is the same as though the discrimination were incorporated in and proclaimed by the statute. *Coulter v. Louisville & N. R. Co.*, 196, U. S. 593, 608, 609, 610, 25 S. Ct. 342, 343, 344, 345, 49 L. Ed. 615 (617, 618); *Chicago B & Q R Co. v. Babcock*, 204 U. S. 585, 597, 27 S. Ct. 326, 328, 51 L. Ed. 636 (640); *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U. S. 350, 353, 38 S. Ct. 495, 62 L. Ed. 1154 (1156); *Southern R. Co. v. Wates*, 260 U. S. 519, 526, 43 S. Ct. 192, 195, 67 L. Ed. 375 (387). Such discrimination may also be shown to be purposeful, and hence a denial of equal protection, even though it is neither systematic nor long continued. Cf. *McFarland v. American Sugar Refining Co.* (241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 899) *supra*.

"The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the approbrious epithets 'willful' and 'malicious' . . ."

[fol. 45] On rehearing in the *Levy Case*, Mr. Justice Simon, speaking for the Court said:

"In the instant case there is no proof that in the enforcement of the municipal zoning and Vieux Carre ordinances that the City acted with a deliberate discriminatory design, intentionally favoring one individual or class over another. It is well accepted that a discriminatory purpose is never presumed and that the enforcement of the laws by public authorities vested, as they are with a measure of discretion will, as a rule, be upheld."

Applying the cases herein cited, to the proof adduced by defendants in support of their claim of unjust, illegal, and discriminatory administration of L.S.A. R.S. 14:59 (6), defendants have failed to sustain their burden.

The claim is without merit.

*L.S.A.-R.S. 14:59(6) Under Which the Defendants Are Charged Is Unconstitutional and in Contravention of the 14th Amendment of the Constitution of the United States, and in Contravention of the Constitution of Louisiana, in That It Was Enacted for the Specific Purpose and Intent to Implement and Further the State's Policy of Enforced Segregation of Races?*

This contention of defendants is without merit.

Certainly under its police power the legislature of the state was within its rights to enact L.S.A.-R.S. 14:59(6).

What motives may have prompted the enactment of the statute is of no concern of the courts. As long as the legislature complied with the constitutional mandate concerning legislative powers and authority, this was all that was required.

"It has been uniformly held that every reasonable doubt should be resolved in favor of the constitutionality of legislative acts. We said in *State ex rel. Know v. Board of Supervisors of Grenada County*, 141 Miss. 701, 105 So. 541, in a case involving Section 175 of the Mississippi Constitution, that if systems (acts) of the kind here involved are evil, or if they destroy local government in the counties and municipalities, that is a question to be settled at the ballot boxes between the people and the Legislature. And whether the law is needed or not, or whether it is wise or not, cannot be settled here. Our functions are to decide whether the Legislature had the power to act in passing the law and not whether it ought to have acted in the manner it did. The court will uphold the constitution in the fullness of its protection, but it will not and cannot rightfully control the [fol. 46] discretion of the Legislature within the field assigned to it by the Constitution."

*State of Mississippi ex rel. Joe T. Patterson, Attorney General v. Board of Supervisors of Prentiss County, Miss. 105 So. 2d. 154. (Mississippi)*

"The state, in the brief of its counsel, argues: 'If we assume that R. S. 58:131 et sequor must be fol-

lowed—then there can be no enforcement of the fish and game laws by the criminal courts. Only a \$25 penalty can be inflicted against a person who is apprehended for wilfully killing a doe deer. Certainly this small 'civil' penalty will not deter wilful game violators and our deer population will soon be decimated. \* \* \* Whether the prescribed civil proceeding with its attendant penalty militates against adequate wild life protection is not for the courts' determination. The question is one of policy which the law-makers must resolve."

State v. Coston, 232 La. 1019, 95 So. 2d. 641.

"We should also retain in our thinking the proposition that the regulation and control of the alcoholic beverage business is peculiarly a legislative function. In this connection, as in all similar situations, when the legislative branch of the government exercises a legislative power in the form of a duly enacted statute or ordinance it is not the function of a court to explore the wisdom or advisability of the enactment in order to bring its enforcement into question. To this end the limits of the court's authority is to measure the validity of the legislative enactment by the requirements of the controlling law. If those standards are met the legislation should be upheld. *Somlyo v. Schott*, supra."

State v. Cochran, 114 So. 2d. 797 (Fla.)

"In *Morgan County v. Edmonson*, 238 Ala. 522, 192 So. 274, 276, we said:

"It is of course a well settled rule that in determining the validity of an enactment, the judiciary will not inquire into the motives or reasons of the Legislature or the members thereof. 16 C.J.S., Constitutional Law, pp. 154, p. 487. 'The judicial department cannot control legislative discretion, nor inquire into the motives of legislators.' *City of Birmingham v. Henry*, 234 Ala. 239, 139 So. 283. See also, *State ex rel. Russum v. Jefferson County Commission*, 224 Ala. 229, 139 So. 243; \* \* \*



It is our solemn duty to uphold a law which has [fol. 47] received the sanction of the Legislature, unless we are convinced beyond a reasonable doubt of its unconstitutionality. *Yielding v. State ex rel. Wilkinson*, 232 Ala. 292, 167 So. 580."

*State v. Hester*, 72 So. 2d. 61 (Ala.)

"Another factor which fortifies our view is this: the act assaulted is a species of social legislation, that is, a field in which the legislative power is supreme unless some specific provision of organic law is transgressed. Absent such transgression it is for the legislature and not the courts to determine what is "unnecessary, unreasonable, arbitrary and capricious". Requiring hotels, motels, and other rooming houses to advertise full details of room charges if they exercise that medium is certainly a legislative prerogative with which the courts have no power to interfere. A legislative finding that such a requirement is in the public interest concludes the matter."

*Adams v. Miami Beach Hotel Association*, 77 So. 2d. 465, (Fla.)

"Statute is not unconstitutional merely because it offers an opportunity for abuses."

*James v. Todd* (Ala) 103 So. 2d. 19. Appeal dismissed 79 S. Ct. 288, 358 U.S. 206, 3 L. Ed. 2d. 235.

"Validity of law must be determined by its terms and provisions, not manner in which it might be administered, operated or enforced."

*Clark v. State* (Miss) 152 So. 820.

"The state legislature is unrestricted, save by the state or federal constitution, and a statute passed by it, in the exercise of the powers, the language of which is plain, must be enforced, regardless of the evil to which it may lead."

*State v. Henry* (Miss) 40 So. 152, 5 L.R.A. N. S. 340.

"If the power exists in the legislative department to pass an act, the act must be upheld by the court,



even though there may be a possibility of administration abuse."

*Stewart v. Mack* (Fla) 66 So. 2d. 811.

"The gravamen of the offense denounced by section 3403 is the entry by one upon the enclosed land or premises of another occupied by the owner or his employees after having been forbidden to enter, or not having been previously forbidden refusing to depart therefrom after warned to do so."

"It is contended that the statute is invalid because [fol. 48] it is apparent that its terms are for the protection of the lessor in the enjoyment of his property. Conceding that to be true, we find no reason for the deduction that the statute is therefore invalid. All statutes against trespass are primarily for the protection of the individual property owner, but they are also for the purpose of protecting society against breaches of the peace which might occur if the owner of the property is required to protect his rights by force of arms."

*Coleman, Sheriff v. State ex rel. Carver* (Fla.) 161 So. 89.

*L.S.A.-R.S. 14:59(6) Exceeds the Police Power of the State, in That It Has No Real, Substantial or Rational Relation to the Public Safety, Health, Morals, or General Welfare, But Has for Its Purpose and Object, Governmentally Sponsored and Enforced Separation of Races, Thus Denying Defendants Their Rights Under the First, Thirteenth, and Fourteenth Amendments to the United States Constitution, and Article 1, Section 2 of the Louisiana Constitution.*

*The Refusal to Give Service Solely Because of Race, the Arrest and Subsequent Charge Are All Unconstitutional Acts in Violation of the 14th Amendment of the United States Constitution, in That the Act of the Company's Representative Was Not the Free Will Act of a Private Individual, But Rather an Act Which Was Encouraged,*

*Fostered and Promoted by State Authority in Support of a Custom and Policy of Enforced Segregation of Race at Lunch Counters?*

*The Arrest, Charge and Prosecution of the Defendants Are Unconstitutional, in That It Is the Result of State and Municipal Action, the Practical Effect of Which Is to Encourage and Foster Discrimination by Private Parties?*

The Court has grouped together for discussion the propositions hereinabove enumerated as they appear to be related to each other in the sum total of defendants complaint of the unconstitutionality of L.S.A.-R.S. 14:59(6).

There is presently no anti-discrimination statute in Louisiana, Sections 3 and 4 of Title 4 of the Revised Statutes having been repealed by Act 194 of 1954. Nor is there any legislation compelling the segregation of the races in restaurants, or places where food is served.

As authority supporting the constitutionality of L.S.A.-R.S. 14:59(6), the following cases are cited:

[fol. 49] In the case of *State v. Clyburn, et. al.*, (N.C.) 1958, 101 S. E. 2d. 295, the defendants, a group of Negroes led by a minister, entered a Durham, North Carolina, ice cream and sandwich shop which was separated by a partition into two parts marked "White" and "Colored". They proceeded to the portion set apart for white patrons and asked to be served. Service was refused and the proprietor asked them to leave, or to move to the section marked "Colored". The minister asserted religious and constitutional bases for remaining. A city police officer placed them under arrest. The defendants were tried and convicted on warrants charging violation of state statutes which impose criminal penalties upon persons interfering with the possession of privately-held property. On appeal the Supreme Court of North Carolina affirmed the conviction. Finding no "state action" within the prohibition of the Fourteenth Amendment, the Court held that the Constitutional rights of defendants had not been infringed by refusing them service or by their subsequent (sic)

In resolving the question, "Must a property owner engaged in a private enterprise submit to the use of his property to others simply because they are members of a different race," the Supreme Court of North Carolina said:

"The evidence shows the partitioning of the building and provision for serving members of the different races in differing portions of the building was the act of the owners of the building, operators of the establishment. Defendants claim that the separation by color for service is a violation of their rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

\* \* \* \* \*

"Our statutes, G. S. Para. 14-126 and 134, impose criminal penalties for interfering with the possession or right of possession of real estate privately held. These statutes place no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The possessor may accept or reject whomsoever he pleases and for whatsoever whim suits his fancy. When that possession is wrongfully disturbed it is a misdemeanor. The extent of punishment is dependent upon the character of the possession, actual or constructive, and the manner in which the trespass is committed. Race confers no prerogative on the intruder; nor does it impair his defense.

The Fourteenth Amendment to the Constitution of the United States created no new privileges. It merely [fol. 50] prohibited the abridgment of existing privileges by state action and secured to all citizens the equal protection of the laws.

Speaking with respect to rights then asserted, comparable to rights presently claimed, Mr. Justice Bradley, in the Civil Rights Cases, 109 U. S. 3, 3 S.Ct. 18, 21, 27 L. Ed. 835, after quoting the first section of the Fourteenth Amendment, said: "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It

nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen* the last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect.

In *United States v. Harris*, 106 U. S. 629, 1 S. Ct. 601, 609, 27 L. Ed. 290, the Court, quoting from *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588 said: "The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not

add anything to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there. The only obligation resting upon the United States is to see that the states do not deny the right. The power of the national government is limited to this guaranty.

More than half a century after these cases were decided the Supreme Court of the United States said in *Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441: "Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action [fol. 51] inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." This interpretation has not been modified: *Collins v. Hardyman*, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253; *District of Columbia v. Thompson Co.*, 346 U. S. 400, 73 S. Ct. 1007, 97 L. Ed. 1480; *Williams v. Yellow Cab Co.*, 3 Cir. 200 F. 2d 302, certiorari denied *Dargatz v. Yellow Cab Co.*, 346 U. S. 840, 74 S. Ct. 52, 98 L. Ed. 361.

*Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133, presented the right of a corporation, organized under the New York law to provide low cost housing, to select its tenants, with the right to reject on account of race, color, or religion. The New York Court of Appeals affirmed the right of the corporation to select its tenants. The Supreme Court of the United States denied certiorari, 339 U. S. 81, 70 S. Ct. 1019, 94 L. Ed. 1385.

The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this

nation. *Madden v. Queens County Jockey Club*, 269 N. Y. 249, 72 N. E. 2d. 697, 1 A. L. R. 2d. 1160; *Terrell Wells Swimming Pool v. Rodriguez* Tex. Civ. App. 182 S. W. 2d. 824; *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N. W. 589, 24 L. R. A., N. S. 447; *Younger v. Judah*, 111 Mo. 303, 19 S. W. 1109; *Goff v. Savage*, 122 Wash. 194, 210 P. 374, *De La Ysla v. Publix Theatres Corporation*, 82 Utah 598, 26 P. 2d. 818; *Brown v. Meyer Sanitary Milk Co.*, 150 Kan. 931, 96 P. 2d. 651; *Horn v. Illinois Cent. R. Co.*, 327 Ill. App. 498, 64 N. E. 2d. 574; *Coleman v. Middlestaff*, 147 Cal. App. 2d. Supp. 833, 305 P. 2d. 1020; *Fletcher v. Coney Island*, 100 Ohio App. 259, 136 N. E. 2d. 344; *Alpaugh v. Wolverton*, 184 Va. 943, 36 S. E. 2d. 906. The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants.

The fact that the proprietors of the ice cream parlor contributed to the support of local government and paid a license or privilege tax which license contained no restrictions as to whom the proprietors could serve cannot be construed to justify a trespass, nor is there merit in the suggestion that the complaint on which the warrant of arrest issued, signed by an officer charged with the duty of enforcing the laws, rather than by the injured party, constituted state action denying privileges guaranteed to the defendants by the Fourteenth Amendment. The crime charged was committed in the presence of the officer and after a respectful request to desist. He had a right to arrest. G.S. Par. 15-41.

*Screws v. United States*, 325 U. S. 91, 65 S. Ct. 1031, 85 L. Ed. 1368; and *State v. Scoggin*, 236 N. C. 19, 72 S. E. 2d. 54, cited and relied upon by defendants, appellants, to support their position, have no factual analogy to this case. Nothing said in those cases in any way supports the position taken by defendants in this case.

[fol. 52] In the case of *Browning vs. Slenderella Systems of Seattle*, (Wash.) (1959), 341 P. 2d. 859, two justices of the Supreme Court of Washington dissented in a ruling of

that court holding a reducing salon came within the purview of an Anti-Discrimination Statute of that State.

In this dissent it was said:

5 "Because respondent is a Negress, the Slenderella Systems of Seattle, a private enterprise, courteously refused to give her a free reducing treatment, as advertised. She thereupon became abusive and brought this civil action for the injury to her feelings caused by the racial discrimination.

This is the first such action in this state. In allowing respondent to maintain her action, the majority opinion has stricken down the constitutional right of all *private* individuals of every race to choose with whom they will deal and associate in their *private* affairs.

No sanction for this result can be found in the recent segregation cases in the United States supreme court involving Negro rights in public schools and public busses. These decisions were predicated upon section 1 of the fourteenth amendment to the United States constitution, which reads:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the *privileges or immunities* of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal* protection of the laws." (Italics mine.)

In the pre-Warren era, the courts had held that the privileges of Negroes under the fourteenth amendment, *supra*, were not *abridged* if they had available to them public services and facilities of *equal quality* to those enjoyed by white people. The Warren antisegregation rule abandoned that standard and substituted the unsegregated enjoyment of public services and facilities as the sole test of Negro equality before the law in such public institutions.



The *rights* and *privileges* of the fourteenth amendment, supra, as treated in the segregation decisions and as understood by everybody, related to *public institutions* and *public utilities* for the obvious reason that no person, whether white, black, red, or yellow, has any right whatever to compel another to do business with him in his *private* affairs.

No public institution or public utility is involved in the instant case. The Slenderella enterprise was not established by law to serve a public purpose. It is not a *public utility* with monopoly prerogatives granted to it by franchise in exchange for an unqualified obligation to serve everyone alike. Its employees are not public servants or officers. It deals in *private personal services*. Its *business*, like most service trades, is conducted pursuant to informal contracts. The (sic) [fol. 53] is the consideration for the service. It is true the contracts are neither signed, sealed, nor reduced to writing. They are contracts, nevertheless, and, as such, must be voluntarily made and are then, and only then, mutually enforceable. Since either party can refuse to contract, the respondent had no more right to compel service than Slenderella had to compel her to patronize its business.

There is a clear distinction between the non-discrimination enjoined upon a public employee in the discharge of his official duties, which are prescribed by laws applicable to all, and his unlimited freedom of action in his private affairs. There is no analogy between a public housing project operated in the government's proprietary capacity, wherein Negroes have equal rights, and a private home where there are no public rights whatever and into which even the King cannot enter.

No one is obliged to rent a room in one's home; but, if one chooses to operate a boarding house therein, it can be done with a clientele selected according to the taste or even the whim of the landlord. This right of discrimination in private businesses is a constitutional one.



The ninth amendment of the United States constitution specifically provides:

'The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.'

All persons familiar with the rights of English speaking peoples know that their liberty inheres in the scope of the individual's right to make uncoerced choices as to what he will think and say; to what religion he will adhere; what occupation he will choose; where, when, how and for whom he will work, and generally to be free to make his own decisions and chooses his course of action in his private civil affairs. These constitutional rights of lawabiding citizens are the very essence of American liberties. For instance, they far outweigh in importance the fifth amendment to the United States constitution which excuses criminals from giving evidence against themselves. It was, in fact, an afterthought. Our constitutional forefathers were chiefly concerned with the rights of honest men. They would have specified their rights with the same particularity that they did in regard to criminals if they had foreseen that courts would become unfamiliar with them.

Cash registers ring for a Negro's as well as for a white man's money. Practically all American businesses, excepting a few having social overtones or involving personal services, actively seek Negro patronage for that reason. The few that do not serve Negroes adopt that policy either because their clientele insist upon exclusiveness, or because of the reluctance of employees to render intimate personal service to Negroes. Both the clientele and the business operator have a constitutional right to discriminate in their private affairs upon any conceivable basis. The right to exclusiveness, like the right to privacy, is essential to freedom. No one is legally aggrieved by its exercise.

[fol. 54] No sanction for destroying our most precious heritage can be found in the *criminal* statute cited by the majority opinion. It does not purport to

create a civil cause of action. The statute refers to "places of *public resort*". (Italics mine). This phrase is without constitutional or legal significance. It has no magic to convert a *private* business into a governmental institution. If one man a week comes to a tailor shop, it is a place of *public resort*, but that does not make it a public utility or public institution, and the tailor still has the right to select his private clientele if he chooses to do so. As a matter of fact, the statute in question is not even valid as a criminal statute. Obviously, this is not the occasion, however, to demonstrate its unconstitutionality.

The majority opinion violates the thirteenth amendment to the United States constitution. It provides, *inter alia*:

"Neither slavery nor involuntary servitude \* \* \* shall exist within the United States \* \* \* (Italics mine)

Negroes should be familiar with this amendment. Since its passage, they have not been compelled to serve any man against their will. When a white woman is compelled against her will to give a Negress a Swedish massage, that too is involuntary servitude. *Henderson v. Coleman*, 150 Fla. 185, 7 So. 2d. 177.

Through what an arc the pendulum of Negro rights has swung since the extreme position of the *Dred Scott* decision: Those rights reached dead center when the thirteenth amendment to the United States constitution abolished the ancient wrong of Negro slavery. This court has now swung to the opposite extreme in its opinion subjecting white people to "involuntary servitude" to Negroes. I dissent."

In the case of *Williams versus Howard Johnson's Restaurant*, (Va.) (1959), U. S. C. A. 4th Cir., F. 2d. 845, a Negro attorney brought a class action in federal court against a restaurant located in Alexandria, Virginia seeking a declaratory judgment that a refusal to serve him because of race, violated the Civil Rights Act of 1875, etc.

An appeal, the Court of Appeals for the Fourth Circuit affirmed the lower court's dismissal for want of jurisdiction

and failure to state a cause of action, on the ground that defendant's restaurant, could refuse service to anyone, not being a facility of interstate commerce, and that the Civil Rights Act of 1875, did not embrace actions of individuals. Further, that as an instrument of local commerce, it was [fol. 55] at liberty to deal with such persons as it might select.

The court said:

"Sections 1 and 2 of the Civil Rights Act of 1875, upon which the plaintiff's position is based in part, provided that all persons in the United States should be entitled to the full and equal enjoyment of accommodations, advantages, facilities and privileges of inns, public conveyances and places of amusement, and that any person who should violate this provision by denying to any citizen the full enjoyment of any of the enumerated accommodations, facilities or privileges should for every such offense forfeit and pay the sum of \$500 to the person aggrieved. The Supreme Court of the United States, however, held in Civil Rights Cases, 109 U. S. 3, that these sections of the Act were unconstitutional and were not authorized by either the Thirteenth or Fourteenth Amendments of the Constitution. The court pointed out that the Fourteenth Amendment was prohibitory upon the states only, so as to invalidate all state statutes which abridge the privileges or immunities of citizens of the United States or deprive them of life, liberty or property without due process of law, or deny to any person the equal protection of the laws; but that the amendment did not invest Congress with power to legislate upon the actions of individuals, which are within the domain of state legislation. The Court also held that the question whether Congress might pass such a law in the exercise of its power to regulate commerce was not before it, as the provisions of the statute were not conceived in any such view (109 U. S. 19). With respect to the Thirteenth Amendment, the Court held that the denial of equal accommodations in inns, public conveyances and places of amusement does not impose the badge

of slavery or servitude upon the individual but, at most infringes rights protected by the Fourteenth Amendment from state aggression. It is obvious, in view of that decision, that the present suit cannot be sustained by reference to the Civil Rights Act of 1875.

The plaintiff concedes that no statute of Virginia requires the exclusion of Negroes from public restaurants and hence it would seem that he does not rely upon the provisions of the Fourteenth Amendment which prohibits the states from making or enforcing any law abridging the privileges and immunities of citizens of the United States or denying to any person the equal protection of the law. He points, however, to statutes of the state which requires the segregation of the races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage; he emphasizes the long established local custom of excluding Negroes from public restaurants and he contends that the acquiescence of the state in these practices amounts to discriminatory state action which falls within the condemnation of the Constitution. The essence of the argument is that the state licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.

This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices. Unless these actions are performed in obedience to some positive provision of state law they do [fol. 56] not furnish a basis for the pending complaint. The license laws of Virginia do not fill the void. Section 35-26 of the Code of Virginia, 1950, makes it unlawful for any person to operate a restaurant in the state without an unrevoked permit from the Commissioner, who is the chief executive officer of the State Board of Health. The statute is obviously designed to protect

the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served. The customs of the people of the state do not constitute state action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in *Shelley v. Kraemer*, 334 U. S. 1; 68 S. Ct. 836, 842:

'Since the decision of this court in the Civil Rights Cases, 1883, 109 U. S. 3 \* \* \* the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is *only such action as may fairly be said to be that of the states*. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. (Emphasis supplied.)'

In the case of *State of Maryland versus Drews, Et. Als.*, Cir. Court for Baltimore Co. (May 6, 1960), (*Race Relations Law Reporter*, Vol. 5, No. 1, Summer—1960) five persons, three white and two Negro, were prosecuted in the Baltimore County, Maryland Circuit Court on the statutory charge of disturbing the peace. It was found that defendants had on the date of their arrest entered an amusement park owned by a private corporation, which unknown to defendants, had a policy of not serving colored persons. A special officer employed by the corporate owners informed defendants of the policy and asked the two colored defendants to leave. When they refused, all five defendants were requested to leave, but all refused. Baltimore County police who were then summoned to the area repeated the requests; but defendants again refused to leave; that over the physical resistance of defendants, they were arrested and removed from the premises.

The Court held: (1) that the park owner, though corporately chartered by the state and soliciting public patronage, could 'arbitrarily restrict (the park's) use to invitees of his selection' etc. \* \* \* (3) that such action occurred in a 'place of public resort or amusement' within terms of the statute allegedly violated, the quoted phrase clearly

applying to all places where some segment of the public habitually gathers, and not merely to publicly-owned places where all members of the public without exception are [fol. 57] permitted to congregate.

The Court said:

"The first question which arises in the case is the question whether an owner of private property to which substantial numbers of persons are invited has any right to discriminate with respect to persons invited thereon, that is to say, whether such owner may exercise his own arbitrary freedom of selection in determining who will be admitted to and who will be permitted to remain upon his property under circumstances where such private property is being used as a place of resort for amusement. This question has been clearly answered in the affirmative by the authorities. In Madden v. Queens County Jockey Club, 72 N. E. 2d. 697 (Court of Appeals of New York), it was said at Page 698:

"At common law a person engaged in a public calling such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. . . . On the other hand, proprietors of private enterprise, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. . . .

"The common-law power of exclusion, noted above, continues until changed by legislative enactment."

The ruling therein announced was precisely adopted in the case of Greenfield v. Maryland Jockey Club, 190 Md. 96, the Court of Appeals, stating at Page 102 of its opinion that:

"The rule that, except in cases of common carriers, innkeepers and similar public callings, one may close his customers is not archaic."

The Court of Appeals also carefully pointed out in the Greenfield case that the rule of the common law is



not altered even in the case of a corporation licensed by the State of Maryland. The doctrine of the Madden and Greenfield cases, *supra*, announced as existing under the common law, has been held valid, even where the discrimination was because of race or color. See *Williams v. Howard Johnson Restaurant*, 268 F. 2d. 845 (restaurant) (CCA 4th); *Slack v. Atlantic White Tower Systems, Inc.*, No. 11073 U.S.D.C. for the District of Maryland, D. R. et. al. Thomsen, J. (restaurant); *Hackley v. Art Builders, Inc., et al* (U.S.D.C.) for the District of Maryland, D. R. January 16, 1960 (real estate development).

The right of an owner of property arbitrarily to restrict its use to invitees of his selection is the established law of Maryland. Changes in the rule of law conferring that right are for the legislative and not the judicial branch of government.

We pass then to the second question: Did such action occur at a place of public resort or amusement? This involves a determination of the legislative meaning of the expression "place of public resort or amusement". If the legislative intent was that the words were intended to apply only to publicly owned places [fol. 58] of resort or amusement, then, manifestly, the testimony would not support a conviction here. By the same token, if the expression was intended to apply only to places in which all members of the public without exception were authorized or permitted to congregate, again there would be no evidence to support conviction here. On the other hand, if the reasonable intent and purpose of the quote phrase was to prohibit disorderly conduct in a place where some segment of the public habitually gathers and congregates, the evidence would clearly justify a conviction.

The first suggested interpretation of the words must be rejected, because of the fact that the same statute uses the term 'public worship', and this fact utterly destroys a contention that the word 'public' has a connotation of public ownership because of our constitutional separation of church and state.

The second suggested interpretation is equally invalid, because its effect, in the light of the rule of law announced in the *Greenfield* case, *supra*, would be the precise equivalent of the first suggested interpretation of the phrase. Moreover, such an interpretation necessarily would mean that the police authorities would be powerless to prevent disorder or bring an end to conditions of unrest and potential disturbance where large numbers of the public may be in congregation. To suggest such an interpretation is to refute it.

In the opinion of this Court the statute has clear application to any privately owned place, where crowds of people other than the owner of the premises habitually gather and congregate, and where, in the interest of public safety, police authorities lawfully may exercise their function of preventing disorder. See *Askew v. Parker*, 312 P. 2d. 342 (California). See also *State v. Lanouette*, 216 N. W. 870 (South Dakota).

It is the conclusion of the Court that the Defendants are guilty of the misdemeanor charged."

• In the case of *Henry v. Greenville Airport Com.*, U. S. Dist. Court (1959) 175 F. Supp. 343, an action asserting federal jurisdiction on the basis of diversity of citizenship, general federal question, and as a class action under federal civil rights statutes was brought in a federal district court by a Negro against the Greenville, S. C., airport commission, members thereof, and the airport manager. The complaint alleged that the manager even though informed that plaintiff was in interstate travel, ordered him to use a racially segregated waiting room. Plaintiff's motion for a preliminary injunction to restrain defendant from making distinctions based on color relative to services at the airport was denied in addition to other reasons, because it was not alleged that defendants had denied him [fol. 59] any right under color of state law. The allegation that defendants received contributions from 'the Government' to construct and maintain portions of the airport was also stricken because it was also held to have nothing to do with the claim that he had been deprived of a civil right under state law. Defendant's motion to dismiss was granted because plaintiff not having alleged that anything com-



plained of was done under color of a specified state law, failed to state a cause of action under Section 1343 of Title 28 and it being inferable from the complaint that he went into the waiting room in order to instigate litigation rather than in quest of waiting room facilities, he had no cause of action under Section 1981 of Title 42 which was said to place duties on Negroes equal to those imposed on white persons and to confer no rights on Negroes superior to those accorded white persons. It was emphasized that activities which are required by the state, must be distinguished from those carried out by voluntary choice by individuals in accordance with their own desires and social practices, the latter kind not being state action.

The court said:

"The plaintiff speaks of discrimination without unequivocally stating any fact warranting an inference of discrimination. The nearest thing to an unequivocal statement in his affidavit is the asserted fact that the purported manager of the Greenville Air Terminal 'advised him that "we have a waiting room for colored folks over there". Preceding that statement plaintiff's affidavit contains the bald assertion that the manager 'ordered me out'. However, the only words attributed to the manager by the plaintiff hardly warrant any such inference or conclusion. A like comment properly should be made concerning the further assertion in plaintiff's affidavit that he 'was required to be segregated'. What that loose expression means is anyone's guess. From whom was he segregated? The affidavit does not say. Was he segregated from his family or from his friends, acquaintances or associates, from those who desired his company and he theirs? There is nothing in the affidavit to indicate such to be true. Was he segregated from people whom he did not know and who did not care to know him? The affidavit is silent as to that also. But suppose he was segregated from people who did not care for his company or association, what civil right of his was thereby invaded? If he was trying to invade the civil rights of others, an injunction might be more properly invoked against

him to protect their civil rights. I know of no civil or uncivil right that anyone has, be he white or colored, to deliberately make a nuisance of himself to the annoyance of others, even in an effort to create or [fol. 60] stir up litigation. The right to equality before the law, to be free from discrimination, invests no one with authority to require others to accept him as a companion or social equal. The Fourteenth Amendment does not reach that low level. Even whites, as yet, still have the right to choose their own companions and associates, and to preserve the integrity of the race with which God almighty has endowed them.

Neither in the affidavit nor in the complaint of the plaintiff is there any averment or allegation that whatever the defendants may have done to the plaintiff was done at the direction or under color of state law. It is nowhere stated in either what right the plaintiff claims was denied him under color of state law. A state law was passed in 1928 that 'created a Commission \* \* \* to be known as Greenville Airport Commission'. That Commission consists of five members, two selected by the City Council of the City of Greenville, two by the Greenville County Legislative Delegation, and the fifth member by the majority vote of the other four. The Commission so created is 'vested with the power to receive any gifts or donations from any source, and also to hold and enjoy property, both real and personal, in the County of Greenville, \* \* \* for the purpose of establishing and maintaining aeroplane landing fields \* \* \*'; and to make such rules and regulations as may be necessary in the conduct and operation of said aeroplane landing fields". (Emphasis added). Further, the Act authorizes 'The City of Greenville \* \* \* to appropriate and donate to said Commission such sums of money as it may deem expedient and necessary for the purpose aforesaid'. There is nothing in the Act that requires that Commission to maintain waiting rooms of any sort, segregated or unsegregated.

There is nothing in the affidavit or complaint of the plaintiff which could be tortured into meaning that the defendants had denied the plaintiff the use of the authorized airport landing fields. He had a ticket which authorized him to board a plane there. He was not denied that right. In fact there is no clear cut statement of any legal duty owed the plaintiff that defendants breached; and there is no showing that the plaintiff was damaged in any amount by anything done by the defendants, or by any one of them, under color of state law."

. . . . .

"The jurisdiction of this court is invoked by the plaintiff under Section 1343, Title 28, U. S. Code. It is appropriate, therefore, that we consider the extent of the jurisdiction that is therein conferred on this court. By it district courts are given jurisdiction of civil actions \* \* \* to redress the deprivation, under color of state law, \* \* \* of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens \* \* \*. Hence we must look to the complaint to ascertain (1) what right plaintiff claims he has been deprived of, (2) secured by what constitutional provision or Act of Congress providing for equal rights of citizens, and (3) under color of what state law? It is not enough for the plaintiff to allege that he has been deprived of a right or a privilege. He must go further and show what right, or privilege, he has been deprived of, by what constitutional provision or [fol. 61] Act of Congress it is secured, and under color of what state law he has been deprived of his stated right. If the plaintiff fails to allege any one or more of the specified elements his action will fail as not being within the jurisdiction of this court.

As pointed out hereinabove, there is no allegation in the complaint that anything complained of was done under color of a specified state law. The Court has been pointed to no state law requiring the separation of the races in airport waiting rooms, and its own re-

search has developed none. Moreover, there is no state law that has been brought to the Court's attention, or that it has discovered, which requires the defendants, or anyone else, to maintain waiting rooms at airports, whether segregated or unsegregated. Hence the advice which it is alleged that the 'purported manager' of the Airport gave the plaintiff, saying 'we have a waiting room for colored folks over there,' could not have been given under color of a state law since there is no state law authorizing or commanding such action.

In connection with the tendered issue of the court's jurisdiction, plaintiff claims that he has a cause of action arising under Section 1981, Title 42, U. S. Code. It provides:

*'All persons within the jurisdiction of the United States shall have the same right in every state \* \* \* to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind \* \* \*'* (Emphasis added).

The undoubted purpose of Congress in enacting Section 1981, was to confer on negro citizens rights and privileges equal to those enjoyed by white citizens and, at the same time, to impose on them like duties and responsibilities. The court's attention has been directed to no law that confers on any citizen, white or negro, the right or privilege of stirring up racial discord, of instigating strife between the races, of encouraging the destruction of racial integrity, or of provoking litigation, especially when to do so the provoker must travel a great distance at public expense.

It is inferable from the complaint that there were waiting room facilities at the airport, but whether those accorded the plaintiff and other negroes were inferior, equal or superior to those accorded white citizens is not stated. It is also inferable from the complaint that the plaintiff did not go to the waiting room

in quest of waiting room facilities, but solely as a volunteer for the purpose of instigating litigation which otherwise would not have been started. The Court does not and should not look with favor on volunteer trouble makers or volunteer instigators of strife or litigation. A significant feature of Section 1981, which by some is little noticed and often ignored, is that it places squarely on negroes obligations, duties and responsibilities equal to those imposed on white citizens, and that said Section does not confer on negroes rights and privileges that are superior and more abundant than those accorded white citizens.

[fol. 62] *Williams v. Howard Johnson's Restaurant, et. al* argued before the Fourth Circuit Court of Appeals June 15, 1959, is in many respects similar to the instant case. As here, the plaintiff had a government job. He went from his place of public employment into the State of Virginia to demand that he be served in a restaurant known to him to be operated by its owner, the defendant, solely for white customers. He invoked the jurisdiction of the court both on its equity side and on its law side for himself and for other negroes similarly situated. The suit was dismissed by the district court. Upon the hearing it was conceded that no statute of Virginia required the exclusion of negroes from public restaurants. Hence the Fourteenth Amendment didn't apply. No action was taken by the defendant under color of state law. Notwithstanding the absence of a state law applicable to the situation, the plaintiff argued that the long established local custom of excluding negroes from white restaurants had been acquiesced in by Virginia for so long that it amounted to discriminatory state action. The Appellate Court disagreed, and so do I. As pointed out in Judge Soper's opinion in the Howard Johnson case, 'This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices.' Further Judge Soper said:

'The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in *Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 842 (92 L. ED. 1161):

'Since the decision of this court in the Civil Rights Cases, 1883, 109 U. S. . . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is *only such action as may fairly be said to be that of the States*. That Amendment erects no shield against merely private conduct, however, discriminatory or wrongful.' (Emphasis supplied)

To say that the right of one person ends where another's begins has long been regarded as a truism under our system of constitutional government. While the rights and privileges of all citizens are declared to be equal by our constitution there is no constitutional command that they be exercised jointly rather than severally; and, if there were such a constitutional command, the rights and privileges granted by the constitution would be by it also destroyed. A constitution so written or interpreted would be an anomaly."

In the case of *Wilmington Parking Authority and Eagle Coffee Shoppe, Inc. versus Burton*, (Del.- 1960) 157 A. 2d. 894, a Delaware Negro citizen was refused service because of race by a Wilmington restaurant located in a leased [fol. 63] space in a public parking building owned by the Wilmington Parking Authority, a state agency. He brought a class action in a state chancery court asking for a declaratory judgment that such discrimination violated the Fourteenth Amendment and for injunctive relief.

On appeal the state supreme court reversed the trial court.

The appellate court held the fundamental problem to be whether the state, directly or indirectly, 'in reality', created or maintained the facility at public expense or controlled its operation; for only if such was the case the Fourteenth Amendment would apply.



The court held that the Authority did not locate the restaurant within the building for the convenience and service of the public using the parking facilities and had not, directly or indirectly, operated nor financially enabled it to operate.

It was held the Authority's only concern in the restaurant—the receipt of rent which defrayed part of the operating expense of providing the public with off-street parking—was insufficient to make the discriminatory act that of the state. And the fact that the City of Wilmington had originally 'advanced' 15% of the facilities, cost (the balance being financed by an Authority bond issue) was held not to make the enterprise one created at public expense for 'slight contributions' were insufficient to cause that result.

Finally, it was held the fact that the leasee sold alcohol beverages did not make it an inn or tavern, which by common law must not deny service to any one asking for it; rather, it functioned primarily as a private restaurant, which by common law and state statute might deny service to anyone offensive to other customers to the injury of its business.

"We think the case before us is distinguishable from the cases relied on by the plaintiff. In the first place, it is quite apparent, nor is there any suggestion to the contrary made by the plaintiff, that the establishment of a restaurant in the space occupied by Eagle is a pure happenstance and was not intended as a service to the public using the parking facility. As far as the record before us indicates, it was immaterial to the [fol. 64] Authority what type of business would occupy the space now occupied by Eagle. The Authority's sole interest was in the obtaining of money in the form of rent. That money is thereafter used by the Authority to support the public purpose of supplying off-street parking from which the plaintiff and the rest of the public benefit.

It is further clear from this record, and from the Ranken case, that at no time did the Authority contemplate the establishment of a restaurant in the structure for the use of its parking patrons. On the contrary, the commercial lease entered into by the Authority



were given to the highest bidders in terms of rent after the solicitation of bids by public advertisement. The decision to lease to a particular lessee was made upon the considerations of the applicants' financial responsibility and the amount of rent agreed to be paid. It is thus apparent that this case completely lacks the element of furnishing service to the public through the means of a lease to private enterprise. The only purpose for this lease is to supply a portion of the additional money required to permit the Authority to furnish the only public service it is authorized to furnish, viz., public off-street parking.

The plaintiff argues that the use of public money to purchase a portion of the land required brings this case within the rule of the cited authorities. But we think not. At the most, approximately 15% of the total cost is represented by the public 'advance' of money. To accept the plaintiff's view would require us in all similar cases to measure the respective contributions made by public and private money and to determine at what point the public contribution changes the nature of the enterprise. It is obvious that there is no guide for judicial speculation upon such a change. If it is said that the contribution of any public money is sufficient to change the nature of the enterprise, the answer is that it has been held that a slight contribution is insufficient. Cf. *Eaton v. Board of Managers*, D. C. 164 F. Supp. 191.

Fundamentally, the problem is to be resolved by considerations of whether or not the public government, either directly or indirectly, in reality, is financing and controlling the enterprise which is charged with racial discrimination. If such is the case, then the Fourteenth Amendment applies; if it is not the case, the operators of the enterprise are free to discriminate as they will. *Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 842, 91 L. Ed. 1161. We neither condemn nor approve such private discriminatory practices for the courts are not the keepers of the morals of the public. We apply the law, whether or not that law follows the current fashion of social philosophy.

Particularly is this true of a state court which is called upon in this field to apply rules made for us by the Supreme Court of the United States which, in the case of this state, have resulted in the discard of a large portion of our local law dealing with the emotional subject of racial relations. We are, of course, bound to follow the Federal decisions, but we think we are equally bound, when they erode our local law, not to extend them to a point beyond which they have not as yet gone.

We think the Authority and, through it, the State of Delaware does not operate, either directly or indirectly, the business of Eagle; has not located the business of Eagle within the facility for the convenience and service of the public using the parking service; and has not financially enabled the business of Eagle to operate. The only concern the Authority has with Eagle is the receipt of rent, without which it would be unable to afford the public the service of off-street parking. This circumstance, we think, is not sufficient to make the discriminatory act of Eagle the act of the State of Delaware.

It follows, therefore, that Eagle, in the conduct of its business, is acting in a purely private capacity. It acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other retail business is required to sell its product to every one. This is the common law, and the law of Delaware as restated in 24 Del C Par. 1501 with respect to restaurant keepers. 10 Am. Jur., Civil Rights PP 21, 22; 52 Am Jur. Theatres PP 9; Williams v. Howard Johnson's Restaurant, 4 Cir. 268 F. 2d. 845. We, accordingly, hold that the operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment.

Finally, plaintiff contends that 24 Del. C. PP 1501, has no application in the case at bar because Eagle, since it serves alcoholic beverages to its patrons, is a tavern or inn and not a restaurant. It is argued that,

at common law, an inn or tavern could deny services to no one asking for it. We think, however, that Eagle is primarily a restaurant and thus subject to the provisions of 24 Del. C. PP 1501, which does not compel the operator of a restaurant to give service to all persons seeking such."

In the case of *Slack v. Atlantic White Tower System, Inc.*, (U.S. Dist. Court, Maryland, 1960), 181 F. Supp. 124, a Negress, who because of race had been refused food service by a Baltimore, Maryland, restaurant (one of an interstate chain owned by a Delaware Corporation) brought a class action in federal court for declaratory judgment and injunctive relief against the corporate owner claiming that her rights under the constitution and laws of the United States had been thereby denied.

The court held that segregated restaurants in Maryland were not required by any state statute or decisional law, but were the result of individual proprietors business choice.

The court also rejected plaintiff's argument that defendant as a licensee of the state to operate a public restaurant, [fol. 66] had no right to exclude plaintiff from service on a racial basis; rather, the restaurant's common law right to select its clientele (even on a color basis), was still the law of Maryland.

Plaintiff's further contention that the state's admission of this foreign corporation and issuance of a restaurant license to it 'invests the corporation with a public interest' sufficient to make its racially exclusive action the equivalent of state action was likewise rejected, the court holding that a foreign corporation had the same rights as domestic business corporations, and that the applicable state license laws were not regulatory. And statements in white primary cases, that when individuals or groups "move beyond matters of merely private concern" and "act in matters of high public interest" they become "representatives of the State" subject to Fourteenth Amendment restraints, were held inapposite to this type situation where defendant had not exercised any powers similar to those of a state or city.

The Court said:

"Plaintiff seeks to avoid the authority of *Williams v. Howard Johnson's Restaurant*, 4 Cir., 268 F. 2d. 845, by raising a number of points not discussed therein, and by arguing that in Maryland segregation of the races in restaurants is required by the State's decisional law and policy, whereas, she argues, that was not true in Virginia, where the *Williams* case arose. She also contends that the *Williams* case was improperly decided and should not be followed by this Court.

• • • • •

Such segregation of the races as persists in restaurants in Baltimore is not required by any statute or decisional law of Maryland, nor by any general custom or practice of segregation in Baltimore City, but is the result of the business choice of the individual proprietors, catering to the desires or prejudices of their customers.

Plaintiff's next argument is that defendant, as a licensee of the State of Maryland operating a public restaurant or eating facility, had no right to exclude plaintiff from its services on a racial basis. She rests her argument on the common law, and on the Maryland license law.

In the absence of statute, the rule is well established that an operator of a restaurant has the right to select the clientele he will serve, and to make such selection based on color, if he so desires. He is not an innkeeper [fol. 67] charged with a duty to serve everyone who applies. *Williams v. Howard Johnson's Restaurant*, 268 F. 2d. at 847; *Alpaugh v. Wolverton*, 184 Va. 943; *State v. Clyburn*, 101 S. Ed. 2d. 295; and authorities cited in those cases. There is no restaurant case in Maryland, but the rule is supported by statements of the Court of Appeals of Maryland in *Grenfeld v. Maryland Jockey Club*, 190 Md. 96, 102, and in *Good Citizens Community Protective Association v. Board of Liquor License Commissioners*, 217 Md. 129, 131.

Art. 56, Secs. 151, et seq., of the Ann. Code of Md., 1939 ed. (163 et seq. of the 1957 ed.), deals with licenses required of persons engaged in all sorts of businesses. Secs. 166 (now 178) provides: 'Each person, firm or corporation, resident or non-resident, operating or conducting a restaurant or eating place, shall, before doing so take out a license therefor, and pay an annual license fee of Ten Dollars (\$10.00) for each place of business so operated except that in incorporated towns and cities of 8,000 inhabitants or over, the fee for each place of business so operated shall be Twenty-Five Dollars (\$25.00)'. The Attorney General of Maryland has said that 'A restaurant is generally understood to be a place where food is served at a fixed price to all comers, usually at all times.' This statement was made in an opinion distinguishing a restaurant from a boarding house for licensing purposes. 5 Op. Atty. Gen. 303. It was not intended to express opinion contrary to the common law right of a restaurant owner to choose his customers. The Maryland Legislature and the Baltimore City Council have repeatedly refused to adopt bills requiring restaurant owners and others to serve all comers regardless of race; several such bills are now pending. See Annual Report of Commission, January 1960, p. 29.

Plaintiff contends that defendant is engaged in interstate commerce, that its restaurant is an instrumentality or facility of interstate commerce and thus subject to the constitutional limitations imposed by the Commerce Clause (Const. Art. 1 sec. 8); and that defendant's refusal to serve plaintiff, a traveler in interstate commerce, constituted an undue burden on that commerce.

A similar contention was rejected in *Williams v. Howard Johnson's Restaurant*, 268 F. 2d. at 818. It would be presumptuous for me to enlarge on Judge Soper's opinion on this point.

The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the states. That Amendment

erects no shield against merely private conduct, however discriminatory or wrongful'. *Shelley v. Kraemer*, 334 U.S. 1, 13. Plaintiff seeks to avoid this limitation by arguing that the admission by the state of a foreign corporation and the issuance to it of a license to operate a restaurant 'invests the corporation with a public interest' sufficient to make its action in excluding patrons on a racial basis the equivalent of state action.

The fact that defendant is a Delaware corporation is immaterial. Once admitted to do business in the State of Maryland, it has the same rights and duties as domestic corporations engaged in the same business. This factor does not distinguish the case from *Williams v. Howard Johnson's Restaurant*, where the state action question was discussed at p. 847.

[fol. 68] The license laws of the State of Maryland applicable to restaurants are not regulatory. See *Maryland Theatrical Corp. v. Brennan*, 180 Md. 377, 381, 382. The City ordinance, No. 1145, November 27, 1957, adding Sec. 601½ to Art. 12 of the Baltimore City Code, 1950 ed. which was not offered in evidence or relied on by plaintiff, is obviously designed to protect the health of the community. Neither the statute nor the ordinance authorizes State or City officials to control the management of the business of a restaurant or to dictate what persons shall be served.

Even in the case of licensees, such as race tracks and taverns, where the business is regulated by the state, the licensee does not become a state agency, subject to the provisions of the Fourteenth Amendment. *Mad-den v. Queen's County Jockey Club*, 296 N. Y. 243, 72 N. E. 2d. 697, cert. den. 332 U. S. 761, cited with approval in *Greenfeld v. Maryland Jockey Club*, 190 Md. at 102; *Good Citizens Community Protective Association v. Board of Liquor License Commissioners*, 217 Md. 129. No doubt defendant might have had plaintiff arrested if she had made a disturbance or remained at a table too long after she had been told that she would only be sold food to carry out to her car. But that implied threat is present whenever the proprietor



of a business refuses to deal with a customer for any reason, racial or other, and does not make his action state action or make his business a state agency. Plaintiff cites *Valle v. Stengel*, 3 Cir., 176 F. 2d. 697. In that case a sheriff's eviction of a negro from a private amusement park was a denial of equal protection of the laws because under the New Jersey antidiscrimination law the Negro had a legal right to use the park facilities.

Plaintiff cites such cases as *Nixon v. Condon*, 286 U.S. 73, and *Smith v. Allwright*, 321 U.S. 649, for the proposition that when individuals or groups 'move beyond matters of merely private concern' and 'act in matters of high public interest' they become 'representatives of the State' subject to the restraints of the Fourteenth Amendment. The distinction between holding a primary election and operating a restaurant is obvious, and has always been recognized by the courts. Defendant has not exercised powers similar to those of a state or city.

In *Kerr v. Enoch Pratt Free Library of Baltimore City*, 4 Cir., 149 F. 2d. 212, also relied on by plaintiff, 'the Library was completely owned and largely supported \* \* \* by the City; \* \* \* in practical effect its operations were subject to the City's control', as the Fourth Circuit pointed out in distinguishing the Library case from *Eaton v. Board of Managers of the James Walker Memorial Hospital*, 4 Cir., 261 F. 2d. 521, 527.

The argument that state inaction in the face of uniform discriminatory customs and practices in operating restaurants amounts to state action was rejected in *Williams v. Howard Johnson's Restaurant*, 4 Cir., 268 F. 2d. 845. Moreover, as we have seen, the factual premise for the argument is not found in the instant case."

[fol. 69] In the case of *Fletcher versus Coney Island, Inc.*, (Ohio 1956), 134 N. E. 2d. 371, a Negro woman sought to enjoin the operator of a private amusement park from refusing her admittance because of her race or color.



In holding that defendant's remedy was to proceed under the State's anti-discrimination law, and not by way of injunction, the Supreme Court of Ohio said:

"In the case of *Madden v. Queens County Jockey Club, Inc.*, 296 N. Y. 249, 253, 72 N. E. 2d. 697, 698, 1 A. L. R. 2d. 1160, 1162, the generally recognized rule is stated as follows:

"At common law a person engaged in a public calling, such as an innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. \* \* \* On the other hand, proprietors of private enterprises such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. \* \* \*

*"The common-law power of exclusion, noted above, continues until changed by legislative enactment."* (Emphasis supplied.)

"See also *Bailey v. Washington Theatre Co.*, 218 Ind. 34 N. J. 2d. 17; annotation, 1 A. L. R. 2d. 1165; and 10 American Jurisprudence 915, Section 22."

"It will be thus observed that the owner or operator of a private amusement park or place of entertainment may arbitrarily and capriciously refuse admittance to whomsoever he pleases, be they Africans, Chinese, East Indians, Germans, Italians, Poles, Russians or any other racial group, in the absence of legislation requiring him to admit them."

• • • • •

"In summary, the decision in this case rests squarely on the proposition that at common law those who own and operate private places of amusement and entertainment can admit or exclude whomsoever they please, and that, since such establishments are open to all only through legislative enactments, those enactments govern the situation, and where as a part of those enactments a specific remedy or penalty is prescribed for their violation, such remedy or penalty is exclusive. The adequacy or appropriateness thereof being a mat-

ter of legislative concern. This decision is limited to this precise point and should be so read and appraised.'

"It should be obvious that the present case bears no relation whatsoever to the problem of the segregation of pupils in the public schools, or to the exclusion of a qualified person from an institution of higher learning [fol. 70] supported by public funds or a person from a publicly owned or operated park or recreation facility, because of his race or color."

In the case of *Tamelleo, et al. v. New Hampshire Jockey Club, Inc.*, (N. H. 1960), 163 A. 2d 10, the plaintiffs presented themselves at the defendant's race track but were refused admission by the action of one of defendant's agents who ordered them to leave the premises because in his judgment their presence was inconsistent with the orderly and proper conduct of a race meeting. The plaintiffs then left the premises and thereafter instituted these proceedings.

The court said:

"It is firmly established that at common law proprietors of private enterprises such as theatres, race tracks, and the like may admit or exclude anyone they choose. *Woolcott v. Shubert*, 217 N. Y. 212, 222, 111 N. E. 829, L. R. A. 1916 E. 248; *Madden v. Queens County Jockey Club*, 296 N. Y. 249, 72 N. E. 2d 697, certiorari denied 332 U.S. 761, 68 S. Ct. 63, 922 Ed. 346; 1 A.L.R. 2d 1165 annotation; 86 C.J.S. Theatres and shows, sec. 31. While it is true, as the plaintiffs argue and the defendants concede, that there is no common-law right in this state to operate a race track where pari-mutuel pools are sold, horse racing for a stake or price is not gaming or illegal. Opinion of the Justices, 73 N. H. 625, 631, 63 A. 505.

"However, the fact that there is no common-law right to operate a pari-mutuel race track is not decisive of the issue before us. The business is still a private enterprise since it is affected by no such public interest so as to make it a public calling as is a railroad

for example. *Garifine v. Monmouth Park Jockey Club*, 29 N. J. ~~Fr.~~ 148 A. 2d. 1; *Madden v. Queens County Jockey Club*, supra. Regulation by the state does not alter the nature of the defendant's enterprise, nor does granting a license to conduct pari-mutuel pools. *North Hampton Racing and Breeders Association v. New Hampshire Racing Commission*, 94 N. H. 156, 159, 48 A. 2d. 472; *Greenfeld v. Maryland Jockey Club*, 190 Md. 96, 57 A. 2d. 335. As the *North Hampton* case points out, regulation is necessary because of the social problem involved. *Id.*, 94 N. H. 159, 48 A. 2d. 475.

"We have no doubt that this state adheres to the general rule that the proprietors of a private calling possess the common-law right to admit or exclude whomever they choose. In *State v. United States & C. Express*, 60 N. H. 219, after holding that a public carrier cannot discriminate, *Doc. C. J.*, stated, 'Others, in other occupations, may sell their services to some, and refuse to sell to others.'" *Id.* 60 N. H. 261." (Emphasis supplied.)

"In *Batchelder v. Hibbard*, 58 N. H. 269, the Court states that a license, so far as future enjoyment is concerned, may be revoked any time. A ticket to a race track is a license and it may be revoked for any reason in the absence of a statute to the contrary. *Marrone v. Washington Jockey Club*, 227 U.S. 633, 33 S. Ct. 401, 61 L. Ed. 679."

[fol 71] "The plaintiffs also contend that if this be our law, we should change it in view of altered social concepts. This argument ignores altogether certain rights of owners and taxpayers, which still exist in this state, as to their own property. Furthermore, to adopt the plaintiff's position would require us to make a drastic change in our public policy which, as we have often stated, is not a proper function of this court.

"The plaintiffs take the position that R.S.A. 284: 39, 40 as inserted by Laws 1959, c. 210, sec. 14, is invalid as an unconstitutional delegation of legislative power. We cannot agree. Laws 1959, c. 210 is entitled:

'An act relative to Trespassing on Land of Another and at Race Tracks and Defining Cultivated Lands". Section 4 (R.S.A. 284:39, under the heading 'Trespassing' reads as follows: 'Rights of Licensee. Any licensee hereunder shall have the right to refuse admission to and to eject from the enclosure of any race track where is held a race or race meet licensed hereunder any person or persons whose presence within said enclosure is in the sole judgment of said licensee inconsistent with the orderly and proper conduct of a race meeting.' As applied to this case this provision is substantially declaratory of the common law which permits owners of private enterprises to refuse admission or to eject anyone whom they desire. *Gardfine v. Monmouth Park Jockey Club*, 29 N. J. 47, 148 A.2d. 1.

"The penalty provision, section 4 (R.S.A. 284:40) states: 'Penalty. Any person or persons within said enclosure without right or to whom admission has been refused or who has previously been ejected shall be fined not more than one hundred dollars or imprisoned not more than one year or both.' This provision stands no differently than does that imposing a penalty upon one who enters without right the cultivated or posted land of another. R. S. A. 572:15 (supp) as amended. One charged with either of these offenses or with trespass at a race track would of course have a right to trial and the charge against him would have to be proved, as in any other criminal matter. No license to pass any law is given to the defendant. The situation is clearly unlike that condemned in *Ferretti v. Jackson*, 88 N. H. 296, 188 A. 474, and Opinion of the Justices, 88 N. H. 497, 190 A. 713, upon which the plaintiffs rely, where the milk board was given unrestricted and unguided discretion, in effect, to make all manners of laws within the field of its activity. It thus appears that there is no unlawful delegation of legislative powers in the present case."

In the case of *Hall v. Commonwealth*, (Va. 1948) 49 S. E. 2d. 369, Appeal Dismissed, See 69 S. Ct. 240), a Jehovah's Witness, was convicted for trespassing on pri-

vate property. He sought appellate relief on the ground that the conviction violated his right to freedom of speech, freedom of the press, freedom of assembly, and freedom of worship guaranteed to him by the Constitutions of the United States and the State of Virginia.

The court said:

[fol. 72] "The statute under which the accused was prosecuted is Chapter 165, Acts of 1934, sec. 4480a, Michie's 1942 Code, which provides: 'That if any person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge or possession of such land he shall be deemed guilty of a misdemeanor, etc. . . .

"Mr. Justice Black in *Martin v. City of Struthers*, 319 U. S. 141, at page 147, 63 S. Ct. 862, at page 865, 87 L. Ed. 1313, speaking of this particular statute and other statutes of similar character, said: 'Traditionally the American Law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more.'

"We find nothing in the statute when properly applied which infringes upon any privilege or right guaranteed to the accused by the Federal Constitution."

"The most recent expressions of the Supreme Court of the United States on this subject are found in *Marsh v. Alabama*, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265, and *Tucker v. Texas*, 326 U. S. 517, 66 S. Ct. 274, 90 L. Ed. 274, both of which were decided by a divided court.

"In concluding the discussion the New York court said: 'Our purpose in this briefly analyzing those

decisions (*Marsh v. Alabama* and *Tucker v. Texas*) is to show that they do not (nor do any others of which we know) go nearly so far as appellants would have us go here. Parkhester, like Chickasaw, Alabama, and the Federal housing community in Texas, is privately owned, but there the similarity as to facts ends. It is undisputed that this defendant has never sought in any way to limit the Witnesses' activities on the streets or sidewalks of Parkhester some of which are privately and some publicly owned. The distribution which this defendant's regulation inhibits was not on the streets, sidewalks or other public or quasi-public places, but inside of and into, the several floors and inner hallways of multiple dwellings.'

. . . . .

"We think the Bohnke case, *supra*, is still the law and leaves solid the regulation of door-to-door calls along public streets. But regardless of the Bohnke ruling, no case we know of extends the reach of the bill of rights so far as to prescribe the reasonable regulation by an owner, of conduct inside his multiple dwelling. So holding, we need not examine the larger question of whether the pertinent clauses of the Constitutions have anything to do with rules made by any dwelling proprietors, governing conduct inside their edifices."

[fol. 73] In the case of *State versus Hunter*, 114 So. 76, 164 La. 405, 55 A. L. R. 309, *Aff. Hunter v. State of La.*, 48 S. Ct. 158, 265 U. S. 508, 72 L. Ed. 398, the Supreme Court of Louisiana said:

"The defendant was convicted of the offense of going on the premises of a citizen of the state, in the nighttime, without his consent, and moving or assisting in moving therefrom a tenant and his property or effects.

• • • "The offense was a violation of the Act No. 38 of 1926, p. 52; which makes it unlawful to go on the premises or plantation of a citizen of this state, in the nighttime or between sunset and sunrise, without his consent, and to move or assist in moving therefrom any laborer or tenant. The act declares that it does not

apply to what is done in the discharge of a civil or military order."

"The defendant pleaded that the statute was violative of the guaranty in the second section of Article 4 of the Constitution of the United States that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and was violative also of the provision in the Fourteenth Amendment that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; and violative of the due process clause and the equal protection clause of the Fourteenth Amendment."

"On the occasion referred to in the bill of information he, (defendant) went upon the plantation of one T. D. Connell, a citizen of Louisiana, in the nighttime and without Connell's consent and moved from the plantation to the state of Arkansas a tenant of Connell and the tenant's property or effects. The defendant was employed by Connell's tenant to do the hauling, and was not discharging any civil or military order. Some of the plantations in that vicinity were owned by citizens of Louisiana and some by persons not citizens of Louisiana. For several months previous to the occasion complained of the defendant was engaged in hauling persons and their property and effects, in the ordinary course of his business, and regardless of whether any of the persons moved were laborers or tenants on premises owned by a citizen of Louisiana or by a citizen of another state.

"The statute is not an unreasonable exercise of the police power of the state. It merely forbids a person having no right to be on the premises of another to go there in the nighttime and without the proprietor's consent—and therefore as a trespasser—and to move or assist in moving from the premises a laborer or tenant or his property or effects. The purpose of the statute, manifestly, is to preserve the right of every



landlord or employer of farm labor to be informed of the removal from his premises of any personal property or effects. Without a statute on the subject it would be unconventional in the rural districts, to say the least, for an outsider to take the liberty of going upon the premises of another in the nighttime to cart away personal property or effects, without the land-[fol. 74] owner's consent. The statute does not discriminate with regard to those who may or may not commit the act. It forbids all alike. The discrimination is in what is forbidden. It is not forbidden—by this particular statute—to trespass upon the land of one who is not a citizen of the state, by going upon his premises in the nighttime without his consent. Perhaps the Legislature used the word "citizen" not in its technical or political sense but as meaning a *resident* of the state, and perhaps the Legislature thought the law would be too harsh if it forbade those engaged in the transfer business to go upon premises belonging to a non-resident—even in the nighttime—without first obtaining his consent. The discrimination, therefore, is not arbitrary or beyond all possible reason. The defendant has no cause to complain that the Legislature did not go further, in enacting the law, and forbid a similar act of trespass upon the premises of a citizen of another state. If he had the right to complain of such discrimination, we would hold that the statute does not deprive the citizens of other states, owning land in this state, of any privilege or immunity guaranteed to the landowners who are citizens of this state. The privileges and immunities referred to in the second section of Article 4 of the Constitution of the United States are only those fundamental rights which all individuals enjoy alike, except insofar as they are all restrained alike. *White v. Walker*, 136 La. 464, 67 So. 332 *Central Loan & Trust Co., v. Campbell Commission Co.*, 173 U. S. 84, 19 S. Ct. 346, 43 L. Ed. 623. If the trespass committed by the defendant in this case had been committed on land belonging to a citizen of another state, there would have been no violation of the Act No. 38 of 1926; and in that event

the citizen of the other state would have had no means of compelling the Legislature of this state to make the law applicable to his case, or right to demand that the courts should declare the law null because not applicable to his case. All of which merely demonstrates that the statute in question is not violative of the second section of Article 4 of the Constitution of the United States or of the due process clause or equal protection clause of the 14th. Amendment."

"These guarantees of freedom of religious worship, and freedom of speech and of the press, do not sanction trespass in the name of freedom. We must remember that personal liberty ends when the rights of others begin. The constitutional inhibition against the making of a law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press does not conflict with the law which forbids a person to trespass upon the property of another."

State v. Martin, et als. 5 So. 2d. 377, 199 La. 39.

In support of their plea of unconstitutionality, defendants cite the cases of *Shelley v. Kraemer*, 334 U.S. 1, 20, 68 S. Ct. 836, 92 L. Ed. 1161, *Marsh v. Alabama*, 326 U. S. 501, *Valle v. Stengel*, 176 F. 2d. 697 (3rd. Cir. 1949), and other citations contained in their brief.

[fol. 75] The State's freedom of action in protecting the peaceful possession of private property outweighs a trespasser's right not to have the state enforce private discriminations. Only when this means of protecting property interests impairs a preferred fundamental right such as freedom of speech, press or religion in a context of great public interest have the courts been inclined to question the constitutionality of a statute. The present state of the law not only recognizes a man's home to be his castle, but allows the state to police his gate and coercively enforce his racial discriminations.

Assuming that arresting the defendants constituted state action (which is denied), the privileges and immunities clause of the 14th. Amendment was not violated because unlike the right to own property (*Shelley v. Kraemer*)

which is defined by statute, there is no specific right or privilege to enter the premises of another and remain there after being asked to depart. In fact the civil and criminal laws of trespass and real property, put the privilege of peaceful possession in the owner. An extension of the doctrine of *Shelley v. Kraemer* one step further would mean a holding that the enforcement of a criminal statute, in itself nondiscriminatory, could become discriminatory when the complainant prosecutes for discriminatory reasons and thus finding state action that discriminates because of race, creed or color.

For the reasons assigned in the authorities supporting the constitutionality of statutes similar to L.S.A.-R.S. 14:59(6), the Court holds defendants citations to be inapplicable to the factual and legal situation present in the case at bar.

Defendants' contentions are without merit.

The Court holds L.S.A.-R.S. 14:59(6) constitutional, and the bill of information filed thereunder good and sufficient in law.

The motion to quash is overruled and denied.

New Orleans, Louisiana, 28th day of November, 1960.

J. Bernard Cocke, Judge.

[fol. 76]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

MOTION FOR A NEW TRIAL—Filed January 3, 1961

And Now Come the said Rudolph Lombard, Oretha Castle, Cecil Carter, Jr., and Sydney L. Goldfinch, Jr., through their attorneys John P. Nelson, Jr., Robert F. Collins, Nils R. Douglas and Lolis E. Elie, and move the court that the verdict be set aside and a new trial ordered for the following reasons, to-wit:

## I.

The verdict is contrary to law in that:

A. Section 14:59(6) of the Louisiana Revised Statutes of 1960 is unconstitutional in that it violates Article 14 of the United States Constitution and Article IX of the Constitution of the State of Louisiana in that it was enacted to implement and further the State's policy and custom of forced segregation of races in public places and/or places vested with a public interest;

B. Section 14:59(6) of the Louisiana Revised Statutes of 1960 is unconstitutional and violative of Article 14 of the Constitution of the United States and Article IX of the Constitution of the State of Louisiana in that it delegates legislative authority to use discretion without setting limits and standards relevant to a legislative purpose reasonably directed toward the public welfare;

C. Defendants were deprived of equal protection of the law when they were ordered to leave a place of business under the circumstances evidenced by the record, which circumstances were prevailing in the community at the time of their arrest;

D. The information charging defendants with violation of L.S.A.-R.S. 14:59(6), to wit, criminal mischief, is invalid in that the evidence established merely that defendants were peacefully upon the premises of McCrory-McClennan Corp., an establishment performing an economic function invested with the public interest, as a customer, visitor, business guest or invitee, and there is no basis for the charge recited by the information other than an effort [fol. 77] to exclude defendants from a portion of the said establishment because of their race or color; defendants at the same time are excluded from equal service at a preponderant number of other similar eating establishments in New Orleans, thereby depriving them of liberty without due process of law and of the equal protection of the laws secured by the 14th. Amendment of the United States Constitution.

E. The evidence offered against defendants in support of the information charging them with violation of L.S.A.-R.S. 14:59(6) establishes that at the time of arrest and at all times covered by the charges, they were in peaceful exercise of constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in McCrory-McClennan Corp., an establishment performing an economic function invested with the public interest; that defendants were peacefully attempting to obtain service in the facilities of McCrory-McLennan Corp., in the manner of white persons similarly situated and at no time were defendants defiant or in breach of the peace and were at all times upon an area essentially public, wherefore defendants have been denied rights secured by the due process and equal protection clauses of the 14th Amendment of the United States Constitution;

F. The evidence establishes that prosecution of defendants was procured for the purpose of preventing them from engaging in peaceful assembly with others for the purpose of speaking and otherwise peacefully protecting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in New Orleans to permit defendants and other members of the Negro race from enjoying the access to facilities and accommodations afforded members of other races; and that by this prosecution, prosecuting witnesses and arresting officers are attempting to employ the aid of the court to enforce a racially discriminatory policy contrary to the due process and equal protection clause of the 14th Amendment to the Constitution of the United States;

G. L.S.A.-R.S. 14:59(6), under which defendants were arrested and charged, is unconstitutional on its face by making it a crime to be on public property after being [fol. 78] asked to leave the premises by an individual at such individual's whim, in that said statute does not require that the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise defendants of the validity of the demand to leave, all of which renders the statute so vague and uncer-

tain as applied to defendants as to violate their rights under the due process clause of the 14th. Amendment to the United States Constitution;

H. L.S.A.-R.S. 14:59(6), under which defendants were arrested and charged with criminal mischief, is on the evidence unconstitutional as applied to defendants in that it makes it a crime to be on property open to the public after being asked to leave because of race or color, in violation of defendant's rights under the due process and equal protection clauses of the 14th. Amendment of the United States Constitution;

I. The evidence offered against the defendants establishes that at the time of arrest and all times covered by the warrant, they were members of the public, attempting to use a facility open to the public, which was denied to them solely because of race or color; that McCrory McLennan Corp. was and is offering, for a price, to serve all members of the public with food; that this public facility, McCrory-McLennan Corp., is, along with others of a similar nature, performing a necessary service for the public which in fact would have to be provided by the state if McCrory-McLennan Corp., and other like facilities were all to withdraw said service; that having determined to offer said valuable service to the public, McCrory-McLennan Corp., is required to provide such service in the manner of state operated facilities of a like nature, to-wit: that McCrory-McLennan Corp., may not segregate or exclude defendants on the ground of race or color, in violation of the due process and equal protection clauses of the 14th. Amendment of the United States Constitution.

## II.

The verdict is contrary to the evidence in that:

[fol. 79] The state did not prove beyond a reasonable doubt that the defendants were ordered by the person in charge to leave the premises.

## III.

The following errors were committed to the prejudice of the accused:



A. The Court refused to allow evidence showing that employees of McCrory-McLennan Corp., were acting in concert with and/on behalf of the law enforcement agencies and officials of the State of Louisiana.

B. The Court refused to sustain objection to leading questions which were material to the issues;

C. The court refused to allow the introduction of evidence showing the effect that McCrory-McLennan Corp., has on inter-state commerce.

Wherefore, your movers pray that, after due proceedings had, the verdict be set aside and a new trial ordered herein.

S. Langston Goldfinch, Jr., Rudolph Lombard, Cecil W. Carter, Jr., Oretha Castle.

John P. Nelson, Jr., Robert F. Collins, Nils R. Douglas, Lolis E. Elie, By: John P. Nelson.

*Duly sworn to by four defendants, jurat omitted in printing.*

[fol. 80]

IN THE CRIMINAL DISTRICT COURT  
PARISH OF ORLEANS

[Title omitted]

MOTION IN ARREST OF JUDGMENT—Filed January 3, 1961

And Now, after verdict against the said Rudolph Lombard, Oretha Castle, Cecil Carter, Jr., and Sydney L. Goldfinch, Jr., through their attorneys John P. Nelson, Jr., Robert F. Collins, Nils R. Douglas, and Lolis E. Elie, and before sentence, move the Court here to arrest judgment herein, and not pronounce the same because of manifest errors in the record appearing, to-wit:

The verdict is contrary to law in that:



A. Section 14:59(6) of the Louisiana Revised Statutes of 1960 is unconstitutional in that it violates Article 14 of the United States Constitution and Article 1 of the Constitution of the State of Louisiana in that it was enacted to implement and further the State's policy and custom of forced segregation of races in public places and/or places vested with a public interest;

B. Section 14:59(6) of the Louisiana Revised Statutes of 1960 is unconstitutional and violative of Article 14 of the Constitution of the United States and Article 1 of the Constitution of the State of Louisiana in that it delegates legislative authority to use discretion without setting limits and standards relevant to a legislative purpose reasonably directed toward the public welfare;

C. Defendants were deprived of equal protection of the law when they were ordered to leave a place of business under the circumstances evidenced by the record, which circumstances were prevailing in the community at the time of their arrest;

D. Louisiana R. S. 14:59(6), under which defendants were arrested and charged, is unconstitutional on its face by making it a crime to be on public property after being asked to leave the premises by an individual at such individual's whim, in that said statute does not require that [fol. 81] the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise defendants of the validity of the demand to leave, all of which renders the statute so vague and uncertain as applied to defendants as to violate their rights under the due process clause of the 14th Amendment of the United States Constitution.

And, because no judgment against them, the said Rudolph Lombard, Oretha Castle, Cecil Carter, Jr., and Sydney L. Goldfinch, Jr., can be lawfully rendered on said record your movers pray that, after due proceedings had, that the judgment herein be arrested.

• Rudolph Lombard, S. Langston Goldfinch, Cecil W. Carter, Jr., Oretha Castle.

John P. Nelson, Jr., Robert F. Collins, Nils R. Douglas,  
Lolis E. Elje, By: John P. Nelson, Jr.

*Duly sworn to by four defendants, jurat omitted in printing.*

[fol. 82]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

BILL OF EXCEPTION No. 1 AND PER CURIAM THEREON—  
January 10, 1961

Be It Remembered that before entering on the trial of this case, your defendants, having heard the Information read and protesting that they were each not guilty of the offense set out therein, filed the following Motion to Quash the said Information:

Motion to Quash, see Tr. p. 9 et seq.

[fol. 83] That on a subsequent day of Court a hearing was had contradictorily with the State on the said Motion to Quash, (the State having first filed an answer to the Motion to Quash), on which testimony was heard and evidence offered, and that the Court took the matter under advisement.

That on the 28th., day of November, 1960, the Court filed a written ruling overruling and denying the said Motion to Quash to which your defendants then and there objected and reserved a bill of exceptions, making a part of the bill of exception the Information, the Motion to Quash the State's answer to the motion to quash, the evidence offered and testimony heard on the motion to quash, and the court's written ruling overruling and denying the said Motion to Quash, and your defendants now perfect this formal bill of exceptions making a part of the same the said Information, the Motion to Quash, the State's answer to the motion to quash, the evidence offered and testimony heard on the motion to quash, the Court's written ruling overruling and

dénying the said Motion to Quash, and the entire record in these proceedings, and first submitting this their formal bill of exceptions to the District Attorney, now tenders the same to the court and prays that the same be signed and sealed by the Judges of this Court, pursuant to the Statute in such case made and provided, which is done accordingly this 10th. day of January, 1961.

J. Bernard Cocke, Judge.

[fol. 84]

Per Curiam to Bill of Exception No. 1

This bill was reserved to the denial of the motion to quash the bill of information.

The motion addresses itself to the constitutionality of L.S.A.-R.S. 14:59(6), the Criminal Mischief statute under which defendants are charged, as well as certain supposed infirmities present in the bill of information.

In passing upon defendants' contentions, the Court filed written reasons upholding the constitutionality of L.S.A.-R.S. 14:59(6), and refusing to quash the bill of information.

The Court makes part of this per curiam the written reasons for judgment.

There is no merit to the bill.

New Orleans, Louisiana, 10th day of January, 1961.

J. Bernard Cocke, Judge.

[fol. 85]

IN THE CRIMINAL DISTRICT COURT  
PARISH OF ORLEANS

[Title omitted]

BILL OF EXCEPTION NO. 2 AND PER CURIAM THEREON—  
January 10, 1961

Be It Remembered that on the hearing of the Motion to Quash, during the direct testimony of Mr. Wendell Barrett, a witness for Mover, the following occurred:

"Q. Mr. Barrett have you sir in the last 30 to 60 days entered into any conference with other department store managers here in New Orleans relative to sit-in demonstrations?

A. I don't know what you mean by conferences.

Q. Discussions with them?

A. We have spoken of it, yes.

Mr. Zibilich: Renew my original objection.

The Court: The objection is well taken. I won't permit you to go any further. You can dictate into the record what you want to ask of this witness.

Mr. Nelson: Respectfully object and reserve a bill of exceptions making the question, the objection, and the ruling of the court all part of the bill.

The purpose of this Your Honor is a question of conformity with state policy.

The Court: The man already said that he had the right to determine the policy, based on tradition, custom and the laws of the community. Is that going to affect me in the slightest that he had a meeting with the manager of D. H. Holmes or Godchaux or anybody else, and I don't see the relevancy of it at all. You have established the policy of this store and the policy nationally dictated giving him the discretion. What more do you want?

By Mr. Nelson:

Q. Mr. Barrett, have you ever met with members of the New Orleans Police Department and discussed problems of sit-in demonstrations and how you or how they should be handled if they arise in your store?

Mr. Zibilich: Object.

The Court: Same objection, same ruling.

Mr. Nelson: Respectfully object and reserve a bill of exception, making the question, the objection and the ruling of the court part of the bill.

By Mr. Nelson:

Q. Now Mr. Barrett, would you kindly tell the court the plan or procedure that your store uses here in the city when sit-in demonstrations take place?

[fol. 86] Mr. Zibilich: Same objection.

The Court: Same ruling.

Mr. Nelson: Respectfully object and reserve a bill of exception making the question, objection and the ruling of the court part of the bill.

Examination (resumed).

By Mr. Nelson:

Q. Do you have a plan that your employees are aware of which is to go into effect if there is a sit-in demonstration in your store?

Mr. Zibilich: Same objection.

The Court: Same ruling.

Mr. Nelson: Reserve a bill making the question, the objection, and ruling of the court part of the bill."

And Be It Further Remembered, that during the trial of the case on its merits, the State called Captain Lucien Cutrera of the New Orleans Police Department as a witness, that the following testimony was had under cross-examination by Mr. Nelson:

"Q. Did you know officer whether there was any plan approved by the police prior as to what the people should do in the event of a sit-in?

A. I didn't catch the question.

Mr. Zibilich: I object to it.

The Court: Read the question.

The Reporter: "Question: Do you know officer whether there was any plan approved by the police prior, as to what the people should do in the event of a sit-in?"

The Court: The objection is well taken.

Mr. Nelson: I would like to clear up the question. So without re-stating the question I wanted him to tell me whether there was any plan approved by the police as to what store managers of stores such as McCrory's should do in the event of a sit-in. That was my question.

The Court: Same objection and same ruling.

Mr. Nelson: Reserve a bill making the question and the answer and the ruling part of the bill.

Mr. Nelson: We have no further questions."

[fol. 87] As will be seen from the above testimony counsel was attempting to show that McCrory's 5 and 10 Cents Store, 1005 Canal Street, New Orleans, Louisiana, through their Manager, Mr. Wendell Barrett, had met with Managers of other department stores in New Orleans, and had met with members of the New Orleans Police Department, in an effort to formulate a plan or procedure to follow in the event of "sit-in" demonstrations, and that this was done in furtherance of the State's policy of forced segregation.

That the State, through the Assistant District Attorney objected to this character of testimony being offered. That the court overruled the said objections made by counsel for the defendants to which ruling of the court, counsel aforesaid then and there objected and reserved a formal bill of exceptions, making the testimony of Mr. Wendell Barrett and also the testimony of Captain Lucien Cutrera, and the questions and answers asked and objected to by counsel, for the State, and the ruling of the court.

To the action of the Court in not allowing counsel to pursue the above line of questioning, counsel now perfects his said Bill of Exceptions and makes a part of this his formal bill of exceptions the entire testimony of Mr. Wendell Barrett given on the hearing of the motion to quash, and the entire testimony of Captain Lucien Cutrera given on the trial of the case on its merits, and the entire record in these proceedings, including all testimony heard and evidence offered, and first submitting this his Bill of Exceptions to the District Attorney, now tenders the same to the Court and prays that the same be signed and sealed

by the Judge of this Court, pursuant to the Statute in such case made and provided, which is done accordingly this 10th day of January, 1961.

J. Bernard Cocke, Judge.

[fol. 88]

Per Curiam to Bill of Exception No. 2

As will be seen from a reading of the statute under which defendants were prosecuted (L.S.A.-R.S. 14:59(6)), the inquiry sought to be established by defendants was irrelevant and immaterial to any of the issues presented by the bill of information and the charge contained therein.

L.S.A.-R.S. 15:435 provides:

"The evidence must be relevant to the material issues."

L.S.A.-R.S. 15:441 reads in part as follows:

"Relevant evidence is that tending to show the commission of the offense and the intent, or tending to negative the commission of the offense and the intent."

L.S.A.-R.S. 15:442 states, in part:

"The relevancy of evidence must be determined by the purpose for which it is offered."

"A trial judge must be accorded a wide discretion whether particular evidence sought to be introduced in criminal prosecution is relevant to case. L.S.A.-R.S. 15:441."

State v. Murphy, 234 La. 909, 102 So. 2d. 61.

"Exclusion of testimony on grounds of irrelevancy rests largely on discretion of trial judge."

State v. Martinez, 220 La. 899, 57 So. 2d. 388.

"In order to be admissible, evidence must be both (1) relevant or material, and (2) competent.

Evidence is competent when it comes from such a source and in such form that it is held proper to admit it.



Evidence is relevant when it is persuasive or indicative that a fact in controversy did or did not exist [fol. 89] because the conclusion in question may be logically inferred from the evidence. The criterion of relevancy is whether or not the evidence adduced tends to cast any light upon the subject of the inquiry." etc.

Wharton's Crim. Ev. (12th Ed.) Vol. 1, p. 283, Sec. 148.

The bill is without merit.

New Orleans, Louisiana, 10th day of January, 1961.

J. Bernard Cocke, Judge.

[fol. 90]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

BILL OF EXCEPTION NO. 3 AND PER CURIAM THEREON—  
January 10, 1961

Be It Remembered that at the conclusion of the trial of this case the Judge found each defendant guilty of the offense set out in the Information on which each defendant was being tried.

That on a subsequent day of the term of this Court, before any judgment was entered on the said verdict rendered by the trial judge finding each defendant guilty, and before any sentencing had been imposed defendants, through counsel, filed a Motion for a New Trial, the said Motion for a New Trial reading as follows:

Motion for New Trial, See Tr. 76, et seq.

[fol. 91] The Court, after hearing the said Motion of the defendants for a New Trial, denied and overruled the same, and to such action of the court, counsel for the defendants then and there objected and reserved a formal Bill of Exception and counsel now perfects this his formal

bill of exceptions to the overruling of the Motion for a New Trial and makes a part hereof the bill of information, the motion to quash, the State's answer to the Motion to Quash, all testimony and evidence offered on the hearing on the motion to quash, the court's written ruling overruling and denying the motion to quash, all evidence offered and testimony heard on the trial of the case on its merits, the motion for new trial, the court's ruling on the motion for a new trial, and the entire record in these proceedings, and first submitting this his Bill of Exceptions to the District Attorney now tenders the same to the Court and prays that the same be signed and sealed by the Judge of this Court, pursuant to the Statute in such case made and provided, which is done accordingly this 10th day of January, 1961.

J. Bernard Cocke, Judge.

[fol. 92]

Per Curiam to Bill of Exception No. 3

The bill was reserved to the denial of defendants' motion to a new trial.

Insofar as the written reasons for denying the motion to quash are applicable to defendants' motion for a new trial the Court submits same as its reasons for denying the said motion.

A reading of the statute under which defendants were prosecuted (L.S.A.-R.S. 14:59(6)), is sufficient refutation to the other allegations of the motion for a new trial, as the matters contended for were irrelevant and immaterial to any of the issues present in the proceedings.

As no request was made of the Court to charge itself on the legal questions raised by defendants in the motion for a new trial, defendants cannot be heard to complain.

The Court was convinced beyond all reasonable doubt, that each and every element necessary for conviction was abundantly proved.

The appellate court is without jurisdiction to pass upon the sufficiency of proof.

New Orleans, Louisiana, 10th day of January, 1961.

J. Bernard Cocke, Judge.

[fol. 93]

## IN THE CRIMINAL DISTRICT COURT

## PARISH OF ORLEANS

[Title omitted]

BILL OF EXCEPTION NO. 4 AND PER CURIAM THEREON—  
January 10, 1961

Be It Remembered that the conclusion of the trial of this case the Judge found each defendant guilty of the offense set out in the information on which each defendant was being tried.

That on a subsequent day of the term of this court, before any judgment was entered on the said verdict rendered by the trial judge finding each defendant guilty, and before any sentence had been imposed defendants, through counsel, filed a Motion in Arrest of Judgment, the said Motion in Arrest of Judgment reading as follows:

Motion in Arrest of Judgment, See Tr. p. 80 et seq.

[fol. 94] The Court, after hearing the said Motion in Arrest of Judgment of the defendants, denied and overruled the same, and to such action of the court, counsel for the defendants then and there objected and reserved a formal Bill of Exception and counsel now perfects this his formal bill of exceptions to the overruling and denying of the said Motion in Arrest of Judgment, and makes a part hereof, the bill of Information, the motion to quash, the State's answer to the Motion to Quash, all the testimony heard and evidence offered on the hearing of the Motion to Quash, the Court's written ruling overruling and denying the motion to quash, all evidence offered and testimony heard on the trial of the case on its merits, the Motion in Arrest of Judgment, the Court's ruling on the motion in arrest of judgment, the motion for a new trial, the court's ruling on the motion for a new trial, and the entire record in these proceedings, and first submitting this his Bill of Exceptions to the District Attorney, now tenders the same to the court and prays that the same be signed and sealed by the Judge of this Court, pursuant to the Statute in such

case made and provided, which is done accordingly this 10th day of January, 1961.

J. Bernard Cocke, Judge.

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[fol. 95]

Per Curiam to Bill of Exception No. 4

This bill was reserved to the denial of defendants' motion in arrest of judgment.

Insofar as the written reasons for denying the motion to quash an applicable to defendants' motion in arrest, the court submits same as its reasons for denying the motion in arrest of judgment.

The remaining contentions of defendants have no place in a motion in arrest of judgment, and were matters of defense.

There is no merit to defendants' bill.

New Orleans, Louisiana, 10th day of January, 1961.

J. Bernard Cocke, Judge.

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[fol. 96]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

MOTION FOR APPEAL AND ORDER THEREON—January 10, 1961

And Now Into Open Court come the defendants, Rudolph Lombard, Oretha Castle, Cecil Carter, Jr., and Sydney L. Goldfinch, Jr., through undersigned counsel, and on suggesting to the Court that the record herein shows error to their prejudice, a miscarriage of justice and same constitutes a violation of their constitutional rights, and that they are desirous to appeal to the Honorable The Supreme Court of the State of Louisiana; and on further suggesting to the Court that each defendant be admitted to bail pending said appeal on each furnishing bond in an amount fixed by this Honorable Court, conditioned as the law directs;

Wherefore, they pray that they be granted a suspensive appeal to the Honorable the Supreme Court of the State of Louisiana, returnable in accordance with law, and further that they each be admitted to bail pending said appeal on each furnishing bond in an amount to be fixed by this Honorable Court as the law directs.

Rudolph Lombard, Oretha Castle, S. Langston Goldfinch, Cecil W. Carter, Jr.

John P. Nelson, Jr., Robert F. Collins, Nils R. Douglas, Lolis E. Elie, By: John P. Nelson, Jr.

### Order

Let a suspensive appeal be granted in this case on behalf of the defendants, Rudolph Lombard, Oretha Castle, Cecil Carter, Jr., and Sydney L. Goldfinch, Jr., to the Supreme Court of the State of Louisiana, and let the return date be the 1st., day of February, 1961; and further that they each be admitted to bail in the sum of Seven Hundred and Fifty Dollars with good and solvent security condition as the law directs; the bond be taken and sureties approved by the Criminal Sheriff for the Parish of Orleans, or by one of his lawful deputies.

New Orleans, La. Jan. 10, 1961

J. Bernard Cocke, Judge.

[fol. 97]

IN THE CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

[Title omitted]

### Transcript of Testimony

Testimony and notes of evidence taken on the trial of the above entitled and numbered cause on the 7th., day of December, 1960, before the Honorable J. Bernard Cocke, Judge Presiding.

APPEARANCES:

Robert J. Zibilich, Esq., Assistant District Attorney, For the State.

John P. Nelson, Jr., Esq., Lolis E. Elie, Esq., Nils Douglas, Esq., Attorneys for defendants Sydney Langston Goldfinch, Jr., Oretta Castle, Joseph Lombard, Cecil W. Carter, Jr.

Reported by:

Charles A. Neyrey, Official Court Reporter, Section "E".

[fol. 98] The Court: Is the State ready?

Mr. Zibilich: Yes sir.

The Court: Is the Defense ready?

Mr. Nelson: Yes sir, we are ready.

ROBERT GLENN GRAVES, a witness for the State, after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Zibilich:

Q. State your name please?

A. Robert Glenn Graves.

Q. Where do you live?

A. 6221 Wainwright Drive.

Q. By whom are you employed?

A. McCrory-McClennan Corporation.

Q. Where are you employed?

A. McCrory's 5 and 10 Cents Store, 1005 Canal Street.

Q. In what capacity?

A. Restaurant Manager.

Q. On the day in question, the 17th., of September, 1960, were you on duty on that day in McCrory's Restaurant?

A. Yes sir, I was.

Q. What time did you come on duty?

A. Seven A. M.

Q. Were you there throughout the day until about 10:30 or 11:00 in the morning?

A. Yes sir.

[fol. 99] Q. Did anything of an unusual nature occur between the hours of 10:00 and 11:00 in the morning?

A. Around about that time, I was in the main restaurant facing towards Burgundy by the cash register, by the main restaurant, and a man came from the side refreshment counter, I have charge of all the counters there, and he motioned to me and I went towards him and as I approached he said—

Mr. Nelson: I object.

Examination (resumed).

By Mr. Zibilich:

Q. Don't say what he said. What did you do?

A. I went to the side counter.

Q. What did you observe, if anything?

A. At the side counter there was seated two colored males and a colored woman and a white man.

Q. Do you see those people in the courtroom today?

A. Yes, they are seated over here.

Q. Were they the ones seated at that bench before the bar?

A. That is right.

Q. You are speaking of a counter and a main restaurant, are there more than one counter in that establishment?

A. Yes sir. They have a main restaurant that seats 210 and we have a counter for colored that seats 53 and then we have a white refreshment bar that seats 24 and then we have two stand-up counters.

Q. The particular counter at which was seated the individuals you described, was that reserved for any particular people?

A. I don't know what you mean.

By the Court:

Q. By color?

A. Yes.



## Examination (resumed).

By Mr. Zibilich:

[fol. 100] Q. For what?

A. For white patrons.

Q. Upon seeing these people, what did you do?

A. I went behind the counter and faced them and said to them, I am not allowed to serve you here. We don't serve you here. We have to sell to you at the rear of the store where we have a colored counter. And then I waited for a reply.

Q. Did you get any?

A. No reply.

Q. What then did you do?

A. I closed the counter.

Q. How? Actually how?

A. Well, I considered it an emergency, unusual circumstances, and we have a sign for that purpose, and then I told the girl on the counter to close down.

By the Court:

Q. What does the sign say?

A. This counter is closed.

We displayed the sign to each one and said this counter is closed, and then we cut off the lights and told the girl, I told the girl to lock-up the money and that the counter was closed for business.

## Examination (resumed).

By Mr. Zibilich:

Q. Did they actually lock-up the counter?

A. Yes sir.

Q. What did the four defendants do?

A. They sat there.

Q. Did you inform anyone about this?

A. I started back to the main restaurant and motioned to one of the girls that approached me, and told her to contact the store manager Mr. Barrett and then I went back to the main restaurant and stood by there.

[fol. 101] Q. Did you do any thing further about calling the police?

A. As a matter of routine procedure I called the police, I think it is Emile Poissnot. That was the usual routine.

Q. This McCrory is located at 1005 Canal Street?

A. Yes sir.

Q. Is that in the city of New Orleans?

A. Yes sir.

Q. I tender the witness. Answer Mr. Nelson and Mr. Elie.

Cross examination.

By Mr. Nelson:

Q. Mr. Graves, as a matter of routine procedure you called the police, Mr. Emile Poissnot?

A. Yes sir.

Q. Who is he?

A. A detective.

Q. Did you know his name before you called him?

A. Yes sir, for some time.

Q. Do you call him because he is a friend of yours?

A. I called him because I knew him, and it was customary in any kind of emergency to call the police.

Q. When you were confronted with this situation you considered this an emergency sir?

A. Yes.

Q. Had you planned what you all were going to do to take care of this particular emergency?

A. Any emergency, fire or drunk or any possibility.

Q. I am talking about when Negroes sit at a white counter, did you plan what you were going to do?

A. No particular plan. They had a sit-in a week and a half before that.

[fol. 102] Q. It had been discussed?

A. We—everybody knew about it.

Q. Did you not plan, or make plans as to what was going to be done?

A. Not any particular plan.

Q. Did you make any particular plans?

A. It came under the same procedure in case of any emergency.

Q. Did you have a consultation with Mr. Barrett before you called the police?

A. That particular day?

Mr. Nelson: At this time I would like to move for a sequestration of all witnesses.

The Court: All witnesses in this case on trial both for the state and the defense step outside in the corridor to await your being called.

Examination (resumed).

By Mr. Nelson:

Q. Did you talk to Mr. Barrett before the police were contacted?

A. That particular day?

Q. Yes sir.

A. I had spoken to him.

Q. Did you speak to him after the defendants were seated at the counter or before they were seated there?

A. About what?

Q. About calling the police?

A. I contacted my clerk and let her call the officers.

Q. Did you call before—did you call the police before or after you called Mr. Barrett?

A. I called the police after I notified Mr. Barrett.

Q. Did you do that on your own initiative?

[fol. 103] The Court: I won't permit you to go into that. It is not relevant.

Whether these people had a right to be there or didn't have a right to be there, or whether they were there by accident or lack of intention contrary to the rules of the establishment—what happened between this man there as a matter of policy is of no consequence, it is irrelevant and immaterial. Let's go on to something else.

—Mr. Nelson: That includes any plan he may have had with the police?

The Court: Let me point this out. I speak of knowledge. In the neighborhood where I live, Canal Boulevard and Mouton Street there are prowlers each night. My neighbors and myself get together and propose to meet in the front

living room of my home, we meet and agree to patrol the neighborhood. Consequently we accost the prowler and we have to shoot him because he comes in my premises. By analogy that is the same idea.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Graves, these defendants were not creating any disturbance by loud talking while they were seated at the counter?

A. Not while I was there. They didn't say anything.

Q. Insofar as you observed they were being quiet?

A. They had nothing to say.

Q. Were they well dressed?

A. I didn't observe that particularly, all this happened in about a period of five minutes and I didn't particularly notice how they were dressed.

Q. Mr. Graves, the only reason why you closed the counter was that these defendants were Negroes and they were sitting there?

A. I considered it an unusual circumstance and I closed it, I considered it a reason for closing the counter. I took [fol. 104] it on myself because I was in charge and I closed the counter.

The Court: You got your answer now go on to something else.

Mr. Nelson: Your Honor before I ask this man some questions I would like to acquaint the court the nature of the questions so the court can rule. I would like to ask this man concerning the effect of McCrory's on interstate commerce.

The Court: He is going to ask you certain questions and you are not to answer until I tell you to do so.

Examination (resumed).

By Mr. Nelson:

Q. How long have you been employed by McCrory's, Mr. Graves?

The Court: I don't see the relevancy of that.

Mr. Nelson: Did the state object?

The Court: The State doesn't have to object.

Mr. Nelson: Then the court— Your Honor I don't—

The Court: I interject an objection. I don't want to sit here and hear a lot of testimony—

Mr. Nelson: That is why I wanted to tell the court what I intended to ask or get from Mr. Graves.

The Court: He is not going to answer the questions.

By Mr. Nelson:

Q. Do you have any idea of what percentage of goods that is purchased by McCrory's and used in your department [fol.105] ment comes from outside the State of Louisiana?

The Court: Don't answer the question.

Mr. Nelson: And for the purpose of the record this is to establish the interstate commerce evidence.

The Court: The Supreme Court of the United States didn't go that far.

Mr. Nelson: I beg your pardon.

The Court: I said that in their decision of the other day the Supreme Court of the United States didn't go that far.

Mr. Nelson: In connection with the ruling of the court like to reserve a bill of exception and making part of the bill my question and the Court's ruling.

Cross examination.

By Mr. Elie:

Q. Mr. Graves in answer to one of Mr. Zibilich's questions, you say that when the defendants sat at the counter you told them that you were not allowed to serve them. Is that correct sir?

A. Can I answer that?

The Court: Yes.

A. Yes.

Q. Will you tell the court why you were not allowed to serve them?

Mr. Zibilich: I don't know whether that is relevant?

[fol.106] The Court: It is not material.

Mr. Elie: Your Honor please—

The Court: The objection is sustained.

Mr. Elie: I think it is material, because if Mr. Graves felt there was some State policy that prevented him from serving these defendants this is a clear state action. I think the question is relevant.

Mr. Zibilich: I think that was covered by the motion to quash and the court has ruled on that.

The Court: The objection is sustained.

Mr. Nelson: Reserve a bill of exception Your Honor and make a part of it the question, the court's ruling and the sustaining the objection, and further make that on the part of all defendants.

By the Court:

Q. Let me ask you a few questions. You refer to the fact that these defendants took seats at the main restaurant or dining room or in the lunch room?

A. No sir, this was at a side counter.

Q. What does that consist of that side counter towards Burgundy?

A. It is on the opposite side of the store. There are 24 stools and it is a straight counter and we serve a variety of foods.

Q. Are there any signs of any kind to indicate what the circumstances are under which you would serve, whether you serve white or colored or both?

[fol. 107] A. No sir.

Q. Now how long has that counter been a white counter?

A. Approximately since 1938.

Q. Since '38. And you say that in another part of the store you have a counter to serve colored folks?

A. Yes sir that is right.

Mr. Nelson: I am going to interpose an objection. This man, I can't quite figure out his direct examination, and therefore I am going to object to the leading type of questions being asked by the Court.

The Court: Your objection is overruled. I know what I am doing.

Mr. Nelson: To which we reserve a bill of exceptions making the objection and the question and the ruling of the court all part of the bill.

The Court: Reread the question and the answer.

The Reporter: "Question: Since '38. And you say that in another part of the store you have a counter to serve colored folks? Answer: Yes sir that is right."

Examination (resumed).

By the Court:

Q. And you informed these defendants there was a counter for colored folks somewhere else in the store?

A. Yes sir.

Q. And they made no reply?

A. No reply.

Mr. Nelson: Same objection for the same reason.

[fol. 108] Mr. Nelson: I objected your Honor.

The Court: Same ruling by the court.

Mr. Nelson: Same objection and reserve a bill of exception making the objection and the ruling of the court as well as the question and answer part of the bill.

Mr. WENDELL BARRETT, a witness for the State, after being first duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Zibilich:

Q. State your name please?

A. Wendell Barrett.

Q. Where do you live Mr. Barrett?

A. 4934 Reed Boulevard.

Q. By whom are you employed?

A. McCrory-McClellan Corporation.

Q. Were you employed by the same corporation on the 17th., of September, 1960?



A. I was.

Q. In what capacity were you employed there on the 17th., of September of this year?

A. Store manager.

Q. Where is that store?

A. 1005 Canal Street.

Q. Is that in the city of New Orleans?

A. New Orleans.

Q. What kind of store is that?

[fol. 109] A. A variety of merchandise.

Q. Do you have any restaurants or counters there?

A. Yes sir.

Q. How many restaurants or counters for serving food does it have?

A. Let me see. There are four.

Q. On this particular day, the 17th., of September, 1960, were you on duty as the manager of that particular store on that particular day?

A. I was.

Q. Were you there between the hours of 10 and 11 A. M.?

A. I was.

Q. Now I want to ask you to look at these defendants seated on the bench before the bar and I ask you whether or not you saw them on that day in that store?

A. I did.

Q. About what time and where?

A. About 10:30 at the side refreshment counter.

Q. What counter?

A. On the Burgundy Street side of the building.

Q. What if anything was anybody doing when you saw these four defendants at that counter, in that vicinity?

A. When I saw the four defendants they were sitting at the counter by themselves and the counter was closed up and there were no other people there.

Q. Were there any police officers present in the vicinity of these defendants?

A. No.

Q. Did any come on the scene?

A. A number came on the scene shortly afterwards.

Q. Do you know the names of any of them?

[fol. 110] A. Major Reuther and Emile Poissnot.

Q. Was there a Cutrera?

A. Yes.

Q. What if anything did you do or say to the defendants?

A. In view of the fact the department was closed I went behind the counter and stood in front of the defendants and showed them the sign reading this department is closed and I asked them if they could read the sign and then I informed them that what the sign said was correct, the department was closed and requested that they leave the department.

Q. What if anything did the defendants say?

A. Didn't say anything, they just sat there.

Q. Did they do anything?

A. Didn't do anything.

Q. Did you say that in a loud voice?

A. I said it in a loud voice so that it could be heard by anyone in the immediate vicinity.

Q. How far were you from the defendants?

A. Standing right in front of them about three feet.

Q. Was anyone else present that you knew, any police officers?

A. Major Reuther, Emile and some of the other officers but I don't recall all their names.

Q. Then what if anything happened with respect to these defendants?

A. Major Reuther asked the defendants if they heard what I said and they didn't make any reply, that I could hear, and he reemphasized the fact the department was closed. He also pointed to the sign as I recall. He asked one of the defendants on the end who was the leader—

Mr. Nelson: I object.

[fol. 111] The Court: What is your objection?

Mr. Nelson: This is hearsay.

The Court: What is hearsay—what the defendants replied?

Mr. Nelson: What the police officer said.

By the Court:

Q. I understood the police officer spoke to one of the defendants or to all of these defendants.

A. That is what I said.

Q. Any replies given by either one of the defendants to the statement in question is not hearsay.

A. He asked the defendant on the end.

Q. Suppose you answer my question. Was there any reply to the question propounded by the officer?

Mr. Nelson: I object to the leading question.

The Court: Objection overruled.

Mr. Nelson: Reserve a bill of exception making the question, the objection and the ruling of the court part of the bill.

By the Court:

Q. You understood my inquiry. You started to say one of the police officers addressed a question to one or several of the defendants?

A. That is correct.

Q. Did either one of the defendants reply to questions asked of them?

A. Yes sir.

Q. Proceed.

[fol. 112] Mr. Nelson: I am going to object to the question.

The Court: The objection is overruled.

Examination (resumed).

By Mr. Zibilich:

Q. Relate what was said and who answered and what was said?

A. Major Reuther asked the defendant on the end there who was the leader of the group—

Q. Who was the defendant?

A. The two colored men on the end and they pointed to the white man.

Mr. Nelson: I object Your Honor, that is all immaterial.

The Court: You may object to all of this testimony. The state has to prove under the very statute here, under the

very wording of the statute the intentionally taking of possession, therefore anything is relevant to show that it was no accident, or the fact that they didn't intend to remain, or that they were just passing through and their feet hurt and they wanted to rest. The state has to prove and they have a right to show it was an intentional taking.

Mr. Nelson: Your Honor, once the counter was closed it was intentional to stay there. The sign was already up.

Respectfully object and reserve a bill of exception making the objection and the ruling and the question part of the bill.

By the Court:

Q. Mr. Barrett, you said something about the two defendants on the end?

A. The two colored men on the end.

[fol. 113] Q. What is your name on the end?

Mr. Nelson: Object Your Honor. Are you addressing the defendants and asking them questions?

The Court: I am asking him his name, so the record can show who he is.

Mr. Nelson: Respectfully reserve a bill of exception to the court's asking the defendants their names.

The Court: All right. I will ask you his name. Will you give me his name?

Mr. Nelson: Yes sir.

The Court: Well what is his name?

Mr. Nelson: Lombard.

The Court: The one on the end?

Mr. Nelson: Yes sir.

The Court: What is the second man's name?

Mr. Nelson: Cecil Carter is the second one.

The Court: Let the record show that the defendants identified by the witness were later identified by name.

[fol. 114] Examination (resumed).

By Mr. Zibilich:

Q. What did they reply?

A. They said the white man on the end was the leader of the group. Major Reuther asked the white man if what they said was correct and I heard the white man say he was the leader.

Mr. Nelson: Object as being leading?

The Court: The objection is overruled.

Mr. Nelson: Reserve a bill and make a part of the bill the necessary ingredients.

The Court: Mr. Barrett you listen to my ruling. Don't listen to either one of the other gentlemen, you listen to me.

Examination (resumed).

By Mr. Zibilich:

Q. What did Major Reuther say to the white man?

A. He asked the white man if he was the leader and he said he was the leader. He asked him what was the purpose, why they were sitting there and the white man said they were going to sit there until they were going to be served.

The Court: Mr. Nelson, the white man what is his name?

Mr. Nelson: You know his name.

The Court: I know his name, but what is his name for the record Mr. Nelson?

Mr. Nelson: Goldfinch.

The Court: The witness identified Goldfinch.

[fol. 115] By Mr. Zibilich:

Q. Was there any more conversation between the officers or you and any of the defendants after that?

A. Major Reuther told the white man, or spoke to the group that he would give them two minutes to leave.

Mr. Nelson: I didn't want to interrupt the witness, but I want to object.

The Court: I wish you would stand on that statement.

Mr. Nelson: I just want the record to show the bill reservation.

The Court: Unless the stenographer is somewhere out of town he heard it.

Mr. Nelson: May I make a statement about the police officers. I object to this type of questions. It may be admissible, this type of questioning under some circumstances—

The Court: You made a lot of objections. You have been giving us a lot of objections. The objection is either good or not good all along the same line. Let's consider your objection to all this character of testimony. The same ruling and the same bill applies.

Examination (resumed).

By Mr. Zibilich:

Q. After Reuther gave them this period of time, did they leave?

A. They didn't. They sat there.

Q. Then what took place in your presence?

A. The time ran out and the police officers led them out the door.

Q. I tender the witness.

[fol. 116] Cross examination.

By Mr. Nelson:

Q. What time of the day was your counter closed at McCrory's?

A. About 10:30.

Mr. Zibilich: Object. Immaterial.

The Court: Your objection is overruled.

Examination (resumed).

By Mr. Nelson:

Q. Have you ever closed that counter at 10:30?

A. I may have closed it at 10:30. It is closed under any sort of disturbance.

Q. In other words if three negroes came up to that counter at 10:30 you would close it?

A. If three negroes walked up there I would tell them

we had a colored counter in the back, because they might be passing through from the North and not understand Southern customs.

Q. Is that a usual—

A. I might mention that is a common procedure—

Q. I will ask the questions. Express your social principles at another place.

The Court: Complete your answer whether he objects to it or not.

A. We have colored people come in sometimes and they don't understand. It is a relatively common thing.

Examination (resumed).

By Mr. Nelson:

Q. Do you have any signs up?

A. No signs sir.

Q. Now it is a fact Mr. Barrett these defendants were [fol. 117] asked to leave only because of the fact they were negroes?

Mr. Ziblich: Object to that.

A. One of them is not a negro.

The Court: I think that question is legitimate.

Examination (resumed).

By Mr. Nelson:

Q. They were asked to leave because of the fact and only because of the fact they were negroes?

A. They weren't all negroes. One was a white man. We asked him to leave too.

Q. The three negroes, you asked them to leave only because of the fact they were negroes?

A. The department was closed and they were asked to leave. They were asked to leave because the department was closed.

Q. But because they were negroes?



A. They were negroes.

Q. They weren't being loud or boisterous?

Mr. Zibilich: I object to that. They aren't charged with disturbing the peace.

The Court: Under the circumstances if he wants to put it in evidence I see no objection.

Mr. Nelson: What is the ruling of the court?

The Court: I see no objection.

Examination (resumed).

By Mr. Nelson:

Q. You may answer that question.

A. No.

Q. They were sitting there quietly?

[fol. 118] A. Yes.

Q. Do you know Emile Possinot?

A. Yes sir.

Q. How often does he go to McCrory's on official duty?

A. Often we call him and I might say we call him quite often for shop lifters, pick pockets, somebody may lose their wallet, he is our contact with the police department.

Mr. Nelson: I would like to ask Mr. Barrett some questions dealing with whether this business is engaged in interstate commerce.

The Court: Don't answer until I rule.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Barrett you are the manager of McCrory's store in New Orleans?

A. Yes sir.

Q. And that is one of a chain of stores throughout the United States?

A. Yes sir.

Q. Do you have any idea of what percentage of the business, the purchases of McCrory's comes from outside the state of Louisiana?

Mr. Zibilich: Object to that question. It is immaterial.

The Court: The objection is sustained.

Mr. Nelson: Reserve a bill of exception making a part of the bill the question, the objection, and the ruling of the court.

Examination (resumed).

By Mr. Nelson:

Q. Do you have any opinion as to the percentage of purchases that go to the lunch counters that come from [fol. 119] outside the State of Louisiana?

Mr. Zibilich: Same objection.

The Court: Same ruling.

Mr. Nelson: And reserve a bill of exception making the question, the answer and the ruling of the court part of the bill.

I have no further questions.

By the Court:

Q. Am I correct in my recollection that Mr. Goldfinch stated that they were going to remain until they were going to be served, is that correct?

A. Yes sir.

Q. Is that what he stated to you and the police officers?

A. Yes sir.

Examination (resumed).

By Mr. Nelson:

Q. How many departments do you have in McCrory's, approximately?

A. Must be about 20, 15 or 20 I would say.

CAPTAIN LUCIEN CUTRERA, a witness for the State, after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Zibilich:

Q. State your full name.

A. Captain Lucien Cutrera.

Q. By whom are you employed?

A. The New Orleans Police Department.

Q. In what capacity?

A. Commanding Officer of the First District Station.

Q. Were you so employed and in the same capacity on [fol. 120] the 17th, of September, 1960?

A. Yes I was.

Q. In connection with your duties as a police officer did you have occasion on that day to investigate any occurrence or alleged sit in demonstration that would have occurred on Canal Street?

A. Yes sir I did, at McCrory's.

Q. Did you go to that store as a result of this investigation?

A. I did.

Q. Did you go alone or were you accompanied by someone?

A. Desk Sergeant Mickey Rizzutto and followed by Technician Bernard Fruchtzweig.

Q. At what time of the day or night did you arrive?

A. Approximately 10:35 A. M.

Q. Where is McCrory's located?

A. Iberville and Burgundy.

Q. Is that in the city of New Orleans?

A. It runs through the block. 1005 Canal Street is the address.

Q. I ask you to look at the four defendants sitting on the bench and tell me whether or not you saw those defendants in McCrory's at that time and date?

A. Yes sir, I did.

Q. You saw all the defendants there?

A. Yes sir.

Q. Where were they the first time you came in the store?

A. Seated at the side lunch counter.

Q. Where is that lunch counter located?

A. In McCrory's store.

Q. Any particular street side of the store, if you recall?

A. Can't recall exactly.

Q. Is it in the back?

A. Towards the back of the store about the middle.

Q. Anyone else around the lunch counter any civilians or police officers?

[fol. 121] A. Yes detective Poissinot, Patrolman Raymond Gonzales, saw the Manager of the store—

Q. Did you meet a man called Barrett?

A. Yes sir, I did.

Q. Would you recognize Barrett if you saw him again?

A. Yes sir.

Q. Was he the man that just left the witness stand?

A. I didn't see who left.

(Mr. Barrett was called into the courtroom for the purpose of identification and then left the courtroom.)

Q. Did you see Mr. Barrett today?

A. Yes sir.

Q. Did you see him in the courtroom?

A. He is the gentleman you just called in.

Q. Did you see that same gentleman, Mr. Barrett, at the store that time and day?

A. Yes sir, I did.

Q. Where was Mr. Barrett when you saw him?

A. Mr. Barrett was standing near the counter and I was introduced to him by Detective Poissinot.

Q. Did either you or Barrett say anything to the defendants?

A. Mr. Barrett went behind the counter and told them the counter was closed and that he didn't wish to serve them and he asked them to leave the store.

Q. Did they leave?

A. No, they said—

Mr. Nelson: I object your Honor.

The Court: Objection is overruled.

[fol. 122] Mr. Nelson: Reserve a bill of exception.

Examination (resumed).

By Mr. Zibilich:

Q. Were you at the lunch counter at all times?

A. Yes sir, I was.

Q. At any time when you were there did the defendants get up and leave?

A. Not until we took them out.

Q. What lead up to your taking them out?

A. After Mr. Barrett asked them to leave the store—

Mr. Nelson: Object to what Mr. Barrett said.

The Court: The objection is overruled.

Mr. Nelson: Reserve a bill of exception.

Examination (resumed).

By Mr. Zibilich:

Q. Proceed.

A. Major Reuther and I were standing immediately to the rear of the four defendants. I was with Major Reuther and he asked if they all understood Mr. Barrett's statement. He asked each one individually and he then told them they had one minute to leave the store.

Q. Did they leave?

A. They did not leave the store, and actually they were not taken out until about 6 minutes passed.

Q. They were placed under arrest?

A. Yes sir.

Q. Who placed them under arrest?

A. Major Reuther and I.

Cross examination.

By Mr. Nelson:

Q. Captain did you take part in any conference with the [fol. 123] District Attorney and tell the District Attorney the story you are telling today?

A. No.

The Court: I didn't understand the question.

Examination (resumed).

By Mr. Nelson:

Q. I asked did he take part in any conference concerning his testimony that he was going to give, with the district attorney?

A. I spoke with Mr. Zibilich outside just before we came in.

Q. Was Mr. Barrett present?

A. No.

Q. Have you talked with Mr. Barrett since this incident happened?

A. No, I haven't.

Q. Have you talked with Mr. Barrett concerning the statements made by Mr. Barrett since the incident happened?

A. Since the arrest?

Q. Yes.

A. No.

Q. Captain, prior to any instructions being given to anyone, did you and Mr. Barrett and Mr. Graves have a conference outside the presence of the defendants?

A. I spoke with Mr. Barrett. I don't know Mr. Graves at all before the arrest or before we spoke to the defendants.

Q. This was outside the presence of the defendants?

A. It was right by the lunch counter.

Q. Who else was present?

A. Detective Poissinot and Patrolman Gonzales as I remember.

Q. Now, who had a law book during that particular conference?

The Court: Ask him first if there was a law book.

Examination (resumed).

By Mr. Nelson:

[fol. 124] Q. Was there a law book present?

A. Not that I know of.

Q. Who decided what law to charge these people under?

Mr. Zibilich: I object to that.

The Court: The objection is well taken.

Examination (resumed).

By Mr. Nelson:

Q. Who decided what statement—

The Court: Ask him first whether it was decided to make any statement. That is improper cross-examination.

Examination (resumed).

By Mr. Nelson:

Q. Statements were made by Mr. Barrett to these defendants?

A. Yes sir.

Q. You testified to what you heard Mr. Barrett say. Did you tell Mr. Barrett what to tell these defendants?

A. I didn't tell him the exact words to say. He asked me what to do.

Q. Now, did you tell Mr. Barrett—

The Court: You asked the question and you got your answer.

Mr. Nelson: Yes, I am asking him the question.

The Court: I am running this show. You cut the witness off. You ask a question and then you cut the witness off.

Mr. Nelson: I am asking the question so as not to get any hearsay in the record and I certainly have a right to that.

I asked him what he said, that is all Judge.



The Court: He is trying to answer you but you all want [fol. 125] to cut him off.

Mr. Nelson: Because he is giving hearsay evidence.

The Court: You take any bills of exception you want but I am still going to let this witness testify. Read the question and you answer the question.

The Reporter: "Question: You testified to what you heard Mr. Barrett say. Did you tell Mr. Barrett what to tell these defendants?" "Answer: I didn't tell him the exact words to say. He asked me what to do."

By the Court:

Q. Now complete your answer.

A. Mr. Barrett had told me he wanted these people out the place.

Mr. Zibilich: I didn't hear that part of the answer.

A. Mr. Barrett had said he wanted the people out of the place, that he wanted them away from the lunch counter. I asked him if he had ordered them away and would he do so in our presence. That we must witness his statement to them that he didn't want them in the place. Mr. Barrett said he was going to order them out the place and he went behind the counter and made the statement to them and while he was talking to them he showed them the sign that said that this counter was closed.

Examination (resumed).

By Mr. Nelson:

Q. Mr. Barrett said he wanted them out too?

A. Away from the counter and out the store.

Q. That is what he told them. Is that your testimony?

A. Yes.

[fol. 126] Q. That is what he told them?

A. As far as I recall it.

Q. Could there be any doubt in your mind?

A. There is no doubt in my mind that he wanted them away from there.

Q. That he wanted them away from the counter?

A. And the store.

The Court: You got your answer Mr. Nelson.

Examination (resumed).

By Mr. Nelson:

Q. And Mr. Emile Poisinot, this detective, isn't it unusual for a place to call for a policeman by name?

A. I don't know how Detective Poissinot received the complaint.

Q. Do you know why he was there?

A. I don't know why or how he was called there.

Q. Was he the first policeman on the scene?

By the Court:

Q. Do you know whether he was or wasn't?

A. I don't know whether he was the first one.

Examination (resumed).

By Mr. Nelson:

Q. Do you know officer whether there was any plan approved by the police prior, as to what the people should do in the event of a sit-in?

A. I didn't catch the question.

Mr. Zibilich: I object to it.

The Court: Read the question.

The Reporter: "Question: Do you know officer whether there was any plan approved by the police prior, as to what the people should do in the event of a sit-in?"

[fol. 127] The Court: The objection is well taken.

Mr. Nelson: I would like to clear up the question. So without restating the question I wanted him to tell me whether there was any plan approved by the police as to what store managers of stores such as McCrory should do in the event of a sit-in. That was my question.

The Court: Same objection and the same ruling.

Mr. Nelson: Reserve a bill making the question and the answer and the ruling part of the bill.

Mr. Nelson: We have no further questions.

Major EDWARD REUTHER, a witness for the state, after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Zibilich:

Q. State your full name?

A. Edward M. Reuther.

Q. By whom are you employed?

A. The New Orleans Police Department.

Q. In what capacity?

A. As Supervisor of Districts.

Q. What is your rank?

A. Major.

Q. And Major were you so employed and in the same capacity on the 17th, of September, 1960?

A. I was.

Q. Were you on duty that day?

A. I was.

[fol. 128] Q. Did you have occasion to investigate an occurrence or alleged occurrence at McCrory's that morning?

A. I did.

Q. Did you go to investigate?

A. I did.

Q. Did you go alone?

A. I went alone.

Q. Where is McCrory's located?

A. 1005 Canal Street.

Q. Is that in the City of New Orleans?

A. Yes sir.

Q. I want you to look at the four defendants seated on the bench before the bar and tell me whether or not you

saw them in McCrory's that morning, of September 17th, 1960?

A. Yes, I saw them.

Q. About what time did you arrive at McCrory's?

A. About 10:35.

Q. What was the first thing you did on arriving?

A. When I first arrived I met Captain Cutrera of the First District and he told me—

Q. Don't say what Captain Cutrera may have said. Did you do anything after that?

A. Yes sir, I approached these four people sitting at the counter and told them the manager had requested that they leave—

Mr. Nelson: I object.

The Court: Objection is overruled.

Mr. Nelson: Reserve a bill of exception.

Examination (resumed).

By Mr. Zibilich:

A. —and I told them they were violating the State law and if the manager insisted that they move we would have [fol. 129] to put them under arrest. I told each one individually. I asked them who was the leader of the group and the white boy said he was. So I again informed him in the presence of the manager that they were violating the City and State laws and if they didn't move we would have to arrest them and he said—

Q. What did he say, you mean Mr. Goldfinch?

A. He told me we came for a purpose and if we don't achieve our purpose we are willing to be arrested, and I told them they had one minute to go with his friends and they didn't move so we phoned for the patrol wagon and about six minutes later it came and we told each one individually they were under arrest and then took them out and put them in the wagon.

**Cross examination.****By Mr. Nelson:**

Q. You heard the manager talking to them asking them to leave?

A. Yes sir.

Q. I have no further questions.

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Technician BERNARD FRUCHTZWEIG, a witness for the State, after first being duly sworn by the Minute Clerk, testified as follows:

**Direct examination.****By Mr. Zibilich:**

Q. State your full name?

A. Bernard Fruchtzweig.

Q. By whom are you employed?

A. New Orleans Police Department.

Q. What capacity?

A. Photographer.

Q. Were you so employed and in the same capacity on the 17th, September, 1960?

A. I was sir.

[fol. 130] Q. On that day, did you have occasion to go to McCrory's Store on Canal Street?

A. Yes sir.

Q. Were you alone or in company with anyone?

A. I was alone when I went there.

Q. I want you to look at these four defendants seated on the bench and ask you whether or not you saw any or all of them at McCrory's Store on that particular day?

A. Yes sir.

Q. You saw all of them?

A. Yes sir.

Q. What did you do?

A. I took some film, movie film.

Q. For about how long did you take film?

A. The film, it is approximately one minute and a half.

Q. Films of what?

A. Them sitting in on the counter.

Q. Did you see the defendants seated on the counter?

A. Yes sir.

Q. Did you bring that film in court today?

A. Yes sir.

Mr. Zibilich: State would ask with the Court's permission to have Officer Fruchtzweig show these films.

The Court: Any objection?

Mr. Nelson: No objection.

I would like the screen placed so the defendants can see it.  
[fol. 131] The Court: They can see better than I can.

Examination (resumed).

By Mr. Zibilich:

Q. While you were taking these pictures, did you take pictures of any police officers?

A. Well—

Mr. Nelson: I object it is a leading question.

The Court: Objection overruled.

Mr. Nelson: Reserve a bill of exception.

A. Yes sir.

Examination (resumed).

By Mr. Zibilich:

Q. Would you name those?

A. Not offhand. I can't name any offhand, no sir.

Q. Do you know any of them?

A. I know some of them. When I am shooting pictures I don't watch who I am shooting.

(The film of defendants seated at the counter were shown to the Court.)

Cross examination.

By Mr. Nelson:

Q. Who asked you to bring your camera to McCrory's Store on the 17th of September, 1960?

A. Captain Cutrera.

Q. I have no further questions.

Mr. Zibilich: In connection with the testimony of the preceding witness the state would like to file in evidence, making same State—1, the film just exhibited being a 16 mm. film, 931A and mark same State 1 for identification. [fol. 132] The Court: Any objection.

Mr. Nelson: None.

The Court: Let it be filed.

Mr. Zibilich: Subject to rebuttal, that is the State's case.

MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

Mr. Nelson: I move for a directed verdict, Your Honor. As I appreciate—

The Court: I didn't hear you.

Mr. Nelson: I move for a directed verdict.

The Court: The motion for a directed verdict is denied.

Mr. Nelson: I'd like about a five minute recess.

[fol. 133] Defense's Case

Mr. RUDOLPH JOSEPH LOMBARD, a witness for the defense (defendant), after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Nelson:

Q. What is your full name?

A. Rudolph Joseph Lombard.

Q. What is your present address?

A. 516 Newton Street.

Q. What is your occupation?

A. Student.

Q. Where?

A. Xavier University.



Q. Mr. Lombard, were you engaged—were you at the McCrory's Department Store on September 17th, 1960, and were you arrested from that place?

A. Yes sir.

Q. At the time you were arrested were you in the company of the three defendants sitting here?

A. Yes.

Q. Now tell the court what happened when you walked in with the people you walked in with? Will you tell the court?

A. I walked in with Oretha Castle. We took seats at the lunch counter at McCrory's and we were shortly joined by Lanny and Mr. Carter.

Q. Lanny is Goldfinch?

A. Goldfinch. And at that time there was, I think, a manager of the store that shortly approached us and stated that there was a colored counter in the back of the store [fol. 134] and they weren't going to serve us and after that with a whistle, or something, they prepared to close the counter down.

Q. Who whistled?

A. The attendant or manager or assistant manager whatever he may have been and they began to remove the stools and they turned the lights around the counter out and placed a sign stating that the counter was closed. From that time I think the police officers entered the store and the manager approached shortly after and they came up and introduced himself and said he was Mr. Barrett and the counter was closed and they weren't going to serve us and he asked us to leave.

Q. Were you told where to go?

A. No, just said would you please leave.

Q. Did you recognize Mr. Graves that testified here earlier?

A. I think you are referring to the gentleman that I referred to as the attendant or assistant manager or the one in charge of the counter.

Q. Mr. Graves testified before Mr. Barrett in this case, was he the one that came up first?

A. Yes sir.

Q. You say he whistled?

A. He made some sort of signal, I am sure it was a whistle.

Q. Right after that whistle everything else happened?

A. One employee began to move the stools, and to put out the lights and close the counter down.

Q. Were any instructions given before that?

A. No, not to my knowledge.

Q. I have no further question.

Cross examination.

By Mr. Zibilich:

No questions.

---

Mr. CECIL WINSTON CARTER, a witness for the defense, [fol. 135] first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Nelson:

Q. Your full name?

A. Cecil Winston Carter, Jr.

Q. What is your address?

A. 337 St. Anthony.

Q. What is your occupation?

A. I am a student.

Q. Where?

A. Dillard University.

Q. Mr. Carter you were arrested at McCrory's store on the 17th of September, 1960 with the other defendants at the bar?

A. I was.

Q. Would you kindly tell the court the circumstances surrounding your arrest? What happened?

A. About 10:30 A. M. I went to the store and I joined the other three defendants who were already seated at the counter and requested service. Upon being denied service by the employees of the store, the one that the previous witness described as the assistant manager he come up

and informed us as a group there was a negro counter in the back and that he wouldn't serve us there and he asked us to go in the back and we sat there and the next thing I knew the counter was in the process of being closed and the sign was put up, the stools removed, the lights were turned out and the foodstuffs on the counter were taken off.

Q. Were any instructions given prior to the employees removing the stools, turning off the lights, etc.?

A. I didn't see any instructions.

Q. What?

A. I didn't see or hear any instructions given.

[fol. 136] Q. Did you recognize Mr. Barrett when he testified, had you ever seen him before?

A. Yes.

Q. What did he tell you in the store anything that day?

A. He said that the counter was closed and asked us to leave.

Q. Did he ask you to leave the store?

A. No he didn't.

Q. What was his words, if you recall?

A. In essence I believe he said this counter is closed and I am asking you to leave, that is all.

Q. I have no further questions.

Cross examination.

By Mr. Zibilich:

Q. Did you leave?

A. No.

Mr. SYDNEY LANGSTON GOLDFINCH, JR., a witness for the defense, defendant, after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Nelson:

Q. What is your full name?

A. Sydney Langston Goldfinch, Jr.

Q. What is your present occupation?

A. Student at Tulane University.

Q. Mr. Goldfinch, you were arrested at McCrory's Department Store on the 17th, September, 1960?

A. I was.

Q. Tell the court the circumstances under which you were arrested?

A. I went to McCrory's about 10:30 and sat at the counter, and shortly was joined by Mr. Lombard who testified earlier, Mr. Carter and Miss Castle, and the man that first [fol. 137] testified for the prosecution came up shortly thereafter and said there was a counter for colored people in the back and when he received no reply or response from any of us he gave a signal and the people, the employees, immediately began to remove the stools, take the dishes off the counter and put up a sign that the counter was closed, then they put off the lights, etc. Shortly thereafter Mr. Barrett came up, identified himself to us and said that the counter was closed. He was standing about three or four feet directly in front of us, in front of me, and he asked us to leave the counter that the counter was closed. We did not leave the counter.

Q. Did he ask any of you to leave the store?

A. No, he did not.

Q. You are positive about that?

A. Quite sure, yes.

Q. When they started removing the stools and cleaning the counter off, were any instructions or any orders given before?

A. Well it appeared to be a very efficient thing, everyone knew what to do. Everybody seemed to know what to do and performed their functions.

Q. Did you hear any instructions?

A. Didn't hear any instructions. Just a signal of some sort, a whistle of some sort of hand signal.

Mr. Zibilich: No questions.

Miss ORETHA MAUREEN CASTLE, a witness for the defense (defendant), after first being duly sworn by the Minute Clerk, testified as follows:

Direct examination.

By Mr. Nelson:

Q. What is your full name?

[fol. 138] A. Oretha Maureen Castle.

Q. What is your present occupation?

A. Student.

Q. Where?

A. Southern University.

Q. Southern University at New Orleans?

A. Yes.

Q. Were you arrested at McCrory's Department Store on the 17th, of September, 1960?

A. I was.

Q. Will you tell the court the circumstances surrounding your arrest?

A. I was involved in a so-called sit in demonstration. I went in the store and sat at a side counter, lunch counter, and sat down. Shortly after we sat there a man appeared before us and said the colored lunch counter was in the back and that he couldn't serve us and when we didn't reply he had the counter closed and after that another man appeared before us and identified himself as the manager of the store and asked us to leave the counter.

Q. You ever requested to leave the store by the manager?

A. No.

Mr. Zibilich: No questions.

The Court: Is that your case?

Mr. Nelson: That is our case.

The Court: Any rebuttal.

[fol. 139] Mr. Zibilich: No, Your Honor.

The Court: You gentlemen wish to argue the matter?

Mr. Zibilich: The State submits it.

(The matter was argued by Mr. Nelson.)

The Court: You wish to be heard Mr. Elie?

Mr. Elie: No. Mr. Nelson is to all of the defendants.

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### VERDICT

The Court: The Court finds the defendants guilty as charged.

The Court will fix the sentencing of these defendants on the third of January, 1961 and in the interim the defendants are discharged on their bail until the third of January.

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[fol. 140] Reporter's Certificate (omitted in printing).

[fol. 141] Clerk's Certificate (omitted in printing).

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[fol. 142]

### DEFENSE EXHIBIT 1

Statement of De Lesseps S. Morrison, Mayor of the City of New Orleans, made on September 13, 1960, and identified as Defense 1 (Appellant 1).

The statement by Mayor Morrison Monday follows:

"I have today directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted.

"The police department, in my judgment, has handled the initial sit-in demonstration Friday and the follow-up picketing activity Saturday in an efficient and creditable manner. This is in keeping with the oft-announced policy of the New Orleans city government that peace and order in our city will be preserved.

"I have carefully reviewed the reports of these two initial demonstrations by a small group of misguided white and Negro students, or former students. It is my considered opinion that regardless of the avowed purpose or intent of the participants, the effect of such demonstrations is not in the public interest of this community.

"Act 70 of the 1960 Legislative session redefines disturbing the peace to include 'the commission of any act as would foreseeably disturb or alarm the public.'"

"Act 70 also provides that persons who seek to prevent prospective customers from entering private premises to transact business shall be guilty of disorderly conduct and disturbing the peace."

"Act 80—obstructing public passages—provides that 'no person shall wilfully obstruct the free, convenient, and normal use of any public sidewalk, street, highway, road, bridge, alley or other passage way or the entrance, corridor or passage of any public building, structure, water craft or ferry by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.'"

"It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demonstrations cease and that henceforth they be prohibited by the police department."

[fol. 143]

#### DEFENSE EXHIBIT 2

Statement of Joseph I. Giarrusso, Superintendent of Police, City of New Orleans, issued on September 10, 1960, and marked for identification Defense 2 (Appellant 2).

#### Giarrusso Statement

Giarrusso issued the following statement:

"The regrettable sit-in activity today at the lunch counter of a Canal st. chain store by several young white and Negro persons causes me to issue this statement to the citizens of New Orleans."

"We urge every adult and juvenile to read this statement carefully, completely and calmly."

"First, it is important that all citizens of our community understand that this sit-in demonstration was initiated by a very small group."

"We firmly believe that they do not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population."



"We believe it is most important that the mature responsible citizens of both races in this city understand that and that they continue the exercise of sound, individual judgment, goodwill and a sense of personal and community responsibility.

"Members of both the white and Negro groups in New Orleans for the most part are aware of the individual's obligation for good conduct—an obligation both to himself and to his community. With the exercise of continued, responsible law-abiding conduct by all persons, we see no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans.

"At the same time we wish to say to every adult and juvenile in this city that the police department intends to maintain peace and order.

"No one should have any concern or question over either the intent or the ability of this department to keep and preserve peace and order.

"As part of its regular operating program, the New Orleans police department is prepared to take prompt and effective action against any person or group who disturbs the peace or creates disorder on public or private property.

"We wish to urge the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest.

"Finally, we want everyone to fully understand that the police department and its personnel is ready and able to enforce the laws of the city of New Orleans and the state of Louisiana."

[fol. 146]

SUPREME COURT  
STATE OF LOUISIANA  
No. 45,491

STATE OF LOUISIANA,

vs.

SIDNEY LANGSTON GOLDFINCH, JR., et al.

OPINION

Appeal From the Criminal District Court  
Parish of Orleans

Honorable J. Bernard Cocke, Judge

SUMMERS, Justice

The four defendants herein, a white and three Negroes, were jointly charged in a bill of information filed by the District Attorney of Orleans Parish with criminal mischief in that on September 17, 1960, they took possession of the lunch counter at McCrory's Store, and remained there after being ordered to leave by the manager in violation of the provisions of Title 14, Section 59 of the Revised Statutes of the State of Louisiana, the pertinent portions of which provide:

"Criminal mischief is the intentional performance of any of the following acts:

. . . . .

(6) Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

[fol. 147] The defendants entered McCrory's store in New Orleans on the morning in question and took seats at one

of the counters therein. McCrory's is part of a national chain operating in thirty-four states, owned by McCrory Stores, Incorporated. The New Orleans establishment is classified as a "variety merchandise" type store, made up of approximately twenty departments and open to the general public. Included in its services to the public are eating facilities composed of a main restaurant that seats 210, a counter for colored persons that seats 53, a refreshment bar that seats 24, and two stand-up counters.

The defendants were refused service at the counter where they were seated and which was reserved for whites, the manager was called, the counter was closed, and the defendants were requested to leave—in accordance with the policy of the store, fixed and determined by the manager in catering to the desires of his customers—or to seek service at a counter in the store providing service for Negroes. Upon their refusal, the police, who had been summoned by the manager, arrested them. They were subsequently tried and convicted of having violated the foregoing statute.

Defendants filed a motion to quash, motion for a new trial and a motion in arrest of judgment, all of which were overruled, and objected to the refusal of the Court to permit the introduction of certain evidence to which bills of exceptions were reserved.

These motions and bills of exceptions pertain primarily to the contention of defendants that the statute under which they were convicted, in its application against Negroes, is unconstitutional and discriminatory in that it denies to them the guarantees afforded by the Due Process and Equal Protection clauses of the Constitution of the United States and the Constitution of the State of Louisiana, particularly that afforded by the Fourteenth Amendment to the Constitution of the United States.

[fol. 148] There should be no doubt, and none remains in our minds, about the applicability of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the state rather than private persons. The second sentence contains the phrases, "No State shall make or enforce any law . . . ." and "nor shall any State deprive any person . . . ."

Since the decision in the Civil Rights Cases, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18, it has been unequivocally under-

stood that the Fourteenth Amendment covers state action and not individual action. Mr. Justice Bradley, speaking for the majority in these cases, stated:

"The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States \* \* \*."

"It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."

The foregoing concrete language indicates emphatically that positive action by state officers and agencies is the contemplated prohibition of the amendment. 43 Cornell L.Q. 375. Mr. Justice Bradley further stated that the wrongful act of an individual is not state action "if not sanctioned in some way by the State, or not done under State authority. \* \* \*." This proposition has been constantly reiterated by the highest court of our land. In *Shelley v. Kraemer*, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, it was stated thusly: "Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

[fol. 149] We are, therefore, called upon to determine whether the enactment of the questioned statute is such action by the State as is prohibited by the Fourteenth Amendment. In this connection it is recognized that the enactment of a statute which on its face provides for discrimination based upon race or color is a violation of the Fourteenth Amendment and constitutes state actions which that constitutional amendment prohibits.

A reading of the statute readily discloses that it makes no reference to any class, race or group and applies to all persons alike, regardless of race. It confers no more rights

on members of the white race than are<sup>6</sup> conferred on members of the Negro race, nor does it provide more privileges to members of the white race than to members of the Negro race. —*Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845. The statute under consideration here stands no differently than does one imposing a penalty upon a person who enters without right the posted lands of another. It is not such a law as would be marked with the characteristic that it has been promulgated by our State for a special design against the race of persons to which defendants belong. To the contrary it is such a law that finds widespread acceptance throughout America. It is a legislative recognition of rights accorded to the owners of property similar to those found in almost all states of our nation. Mr. Justice Black in *Martin v. City of Struthers*, 319 U.S. 141, 87 L. Ed. 1313, 63 S. Ct. 862, referring to a statute of Virginia similar in scope to that here involved, said: "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more."

Not being impressed with features which would make it as discriminatory and *a fortiori* unconstitutional,<sup>1</sup> we conclude that the constitutionality of the statute must be pre-[fol. 150] sumed. *State v. Winchill & Rosenthal*, 147 La. 781, 86 So. 181, writ of error dismissed 258 U.S. 605; *Panama R. R. Co. v. Johnson*, 264 U.S. 375, 68 L. Ed. 748, 44 S. Ct. 391; *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 72 L. Ed. 303, 48 S. Ct. 194; *State v. Grosjean*, 182 La. 298, 161 So. 871; *State v. Saia*, 212 La. 868, 33 So. 2d 665; *Schwegmann Bros. v. La. Board of Alcoholic Beverage Control*, 216 La. 148, 43 So. 2d 248; *Olivedell Planting Co. v. Town of Lake Providence*, 217 La. 621, 47

<sup>1</sup> *Buchanan v. Warley*, 245 U.S. 60, 62 L. Ed. 149, 38 S. Ct. 16; *Flemming v. South Carolina Electric and Gas Co.*, 224 F. 2d 752, appeal dismissed, 351 U.S. 901; *Browder v. Gayle*, 142 F. Supp. 707, affirmed, 352 U.S. 903; *Evers v. Dwyer*, 358 U.S. 202, 3 L. Ed. 2d 222, 79 S. Ct. 178; *Dorsey v. State Athletic Comm.*, 168 F. Supp. 149, appeal dismissed and certiorari denied, 359 U.S. 533.

So. 2d 23; *Jones v. State Board of Education*, 219 La. 630, 53 So. 2d 792; *State v. Rones*, 223 La. 839, 67 So. 2d 99; *State v. McCrory*, 237 La. 747, 112 So. 2d 432; *Michon v. La. State Board of Optometry Examiners*, 121 So. 2d 565; 11 Am. Jur., Const. Law, Sec. 97.

Furthermore, courts will not hold a statute unconstitutional because the legislature had an unconstitutional intent in enacting the statute which has not been shown here. *Doyle v. Continental Insurance Co.*, 94 U.S. 535, 24 L. Ed. 148; *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 93 L. Ed. 632, 69 S. Ct. 550; *State v. County Comm.*, 224 Ala. 229, 139 So. 243; *Morgan v. Edmondson*, 238 Ala. 522, 192 So. 274. The courts will test a statute as it stands, without considering how it might be enforced. *James v. Todd*, 267 Ala. 495, 103 So. 2d 19, appeal dismissed, 358 U.S. 206; *Clark v. State*, 169 Miss. 369, 152 So. 820. Courts in considering constitutionality of legislation cannot search for motive. *Shuttlesworth v. Birmingham Board of Education*, 162 F. Supp. 372, affirmed, 358 U.S. 101.

Defendants further assert in their attack upon the statute that by content, reference and position of context it is designed to apply to, and be enforced in an arbitrary manner against, members of the Negro race and those acting in concert with them. In aid of this assertion certain House bills of the Louisiana Legislature for 1960, introduced in the same session with the contested statute, were offered in evidence.<sup>2</sup> All of these bills did not become law, but [fol. 151] some did.<sup>3</sup> It is declared that this law and the others enacted during the same session were designed to apply to and be enforced against, in an arbitrary manner, members of the Negro race. We have carefully reviewed the provisions of these bills referred to which were enacted into law and nowhere in their content or context do we find that any of them seek to discriminate against any class, group, or race of persons. We therefore find no merit in

<sup>2</sup> See Official Journal of the Proceedings of the House of Representatives of the State of Louisiana, 23rd Regular Session, 1960, House Bills 343-366, inclusive.

<sup>3</sup> See Acts 68, 69, 70, 73, 76, 77, 78, 79, and 81, representing the only House Bills referred to in Footnote 1, which were enacted by the Legislature.



this contention and, accordingly, dismiss it as being unsupported.

But the primary contention here, conceding the constitutionality of the statute on its face, has for its basis that the statute is unconstitutional in its application and the manager and employees of the store were acting in concert with the municipal police officers who made the arrest, the district attorney in charging defendants, and the court in trying defendants' guilt; that these acts constitute such state action as is contemplated by the prohibition of the Fourteenth Amendment. We have noted, however, that in order for state action to constitute an unconstitutional denial of equal protection to the defendants here that action must provide for discrimination of a nature that is intentional, purposeful, or systematic. *Snowden v. Hughes*, 321 U.S. 1, 88 L. Ed. 497, 64 S. Ct. 397; *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U.S. 182, 89 L. Ed. 857, 65 S. Ct. 624; *City of Omaha v. Lewis & Smith Drug Co.*, 156 Neb. 650, 57 N.W. 2d 269; *Zorack v. Clauson*, 303 N.Y. 161, 100 N.E. 2d 463; *State v. Anderson*, 206 La. 986, 20 So. 2d 288; *City of New Orleans v. Levy*, 233 La. 844, 98 So. 2d 210; 12 Am. Jur., *Constitutional Law*, Sec. 566. Nor is a discriminatory purpose to be presumed. *Tarrance v. Florida*, 188 U.S. 519, 47 L. Ed. 572, 23 S. Ct. 402.

The defendants sought to introduce evidence to establish that the action of the manager of McCrory's was provoked or encouraged by the state, its policy, or officers, and they would have this Court hold that this action of McCrory's was not its own voluntary action, but was influenced by the officers of the state. The conclusion contended for is in-[fol. 152] compatible with the facts. Rather, the testimony supports a finding that the manager of McCrory's had for the past several years refused service to Negroes, that the policy of the store was established by him, that he had set out the policy and followed it consistently; that Negroes had habitually been granted access to only one counter within the store and a deliberately provoked mischief and disturbance such as the one he complained of here had not previously occurred. In the past other Negroes who had mistakenly taken seats at the counter in question and who were told to move had cooperated and recognized the re-



quests of the McCrory's employees and had sat at the counter set aside for them.

Even under the provision of the questioned statute it is apparent that a prosecution is dependent upon the will of the proprietor, for only after he has ordered the intruder to relinquish possession of his place of business does a violation of the statute occur. The state, therefore, without the exercise of the proprietor's will can find no basis under the statute to prosecute.

These facts lead us to the conclusion that the existence of a discriminatory design by the state, its officers or agents, or by its established policy, assuming such could have been shown, would have had no influence upon the actions of McCrory's. The action of bringing about the arrest of the defendants, then, was the independent action of the manager of the privately owned store, uninfluenced by any governmental action, design, or policy—state or municipal—and the arrest was accomplished in keeping with McCrory's business practice established and maintained long before the occasion which defendants seek to associate with a discriminatory design by the state. Furthermore, it is quite clear from the oral argument of defense counsel that this prosecution was sought after and provoked by the defendants themselves, and in reality the conviction they have sustained is the result of their own contrivance and mischief and is not attributable to state action.

[fol. 153] The business practice which McCrory's had adopted was recognized then and is now recognized by us to be a practice based upon rights to which the law gives sanction. It has been expressed as follows:

"The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation \* \* \* The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants." See *State v. Clyburn*, 247 N.C. 455, 101 S.E. 2d 295, and authorities therein cited. This right of the operator of a private enterprise is a well-recognized one as defendants concede. "The rule that, except in cases of common carriers, innkeepers and similar public callings, one

may choose his customers is not archaic." *Greenfield v. Maryland Jockey Club*, 190 Md. 96, 57 A. 2d 335.

The right to prevent a disturbance on one's private property and the right to summon law enforcement officers to enforce that right are rights which every proprietor of a business has whenever he refuses to deal with a customer for any reason, racial or otherwise, and the exercise of those rights does not render his action state action or constitute a conspiracy between the proprietor and the peace officer which would result in state action. *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124, affirmed, 284 F. 2d 746.

There is presently no anti-discrimination statute in Louisiana, nor is there any legislation compelling the segregation of the races in restaurants or places where food is served. There being no law of this State, statutory or decisional, requiring segregation of the races in restaurants or places where food is served, the contention that the action of the officials here is discriminatory is not well-founded for that action is not authorized by state law.

The defendants have sought to show through evidence adduced at the trial that there is no integration of the races in eating places in New Orleans and, therefore, the custom of the state is one that supports segregation and [fol. 154] hence state action is involved. This argument overlooks the fact that the segregation of the races prevailing in eating places in Louisiana is not required by any statute or decisional law of the State or other governmental body, but is the result of the business choice of the individual proprietors, both white and Negro, catering to the desires and wishes of their customers, regardless of what may stimulate and form the basis of the desires. *Slack v. Atlantic White Tower System, Inc.*, supra.

To the same effect is the language of the Court in *Williams v. Howard Johnson's Restaurant*, supra, viz.:

"This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice, and without compulsion by the people of the state in accordance with their own desires and social practices.

. . . . .

"The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment."

The effect of the contentions of defendants is to urge us to disregard and ignore certain rights of owners and taxpayers in the enjoyment of their property, unaffected by any public interest, in order that they may impose upon the proprietor their own concept of the proper use of his property unsupported by any right under the law or Constitution to do so. We cannot forsake the rights of some citizens and establish rights for others not already granted by law to the prejudice of the former; this is a legislative function which it is not proper for this Court to usurp. *Tamalleo v. New Hampshire Jockey Club, Inc.*, 102 N. H. 547, 163 A. 2d 10. The fundamental propositions presented here are not novel; we treat them as settled and their change is beyond our province.

The conviction and sentence are affirmed.

[fol. 155]

SUPREME COURT  
STATE OF LOUISIANA

[Title omitted]

PETITION FOR REHEARING

To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of Louisiana:

The petition of Sydney L. Goldfinch, Jr., Rudolph Lombard, Oretta Castle and Cecil Carter, Jr., through their undersigned counsel, with respect shows:

I.

That the decree of this Honorable Court rendered on the 29th day of June, 1961, in the above entitled and numbered cause, is contrary to the law and jurisprudence of the State of Louisiana and the United States and that this Court

should grant a re-hearing to correct errors in said decree, which are as follows:

- (1) The Court was in error in finding lack of "state action" in the demand that the defendants leave the counter. In the decree rendered by this Court, on Page 7 we find the following:

"...The action of bringing about the arrest of the defendants, then, was the independent action of the manager of the privately owned store, uninfluenced by any government action, design, or policy—state or municipal..."

This finding completely ignores the orders of Mayor Mor-[fol. 156] rison issued to the police on September 13, 1960, —4 days before the named "sat-in". The pertinent part of Mayor Morrison's instructions are as follows:

"I have today directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted.

"It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demonstrations cease and that henceforth they be prohibited by the police department."

A reading of the record will clearly show that the entire act was initiated by action of the municipal government—a state agency. At no time did the manager of the store request that the defendants "leave the premises." The ejection of the defendants from the premises was initiated and carried out by members of the New Orleans Police Department.

- (2) The Court was in error in failing to consider the contemporary history of the statute in question, namely Act 77(1) of 1960 (R.S. 14:59(6)). The Court did not give due regard to the relevant conditions existing in the state at the time R.S. 14:59(6) was adopted and enforced.

(3) The Court was in error in failing to find that the segregation policies of the state and municipal governments were the determining factor in the segregated eating facilities in McCrory's, hence the decision of the management to continue segregated eating facilities was state action.

(4) This Court in its decree on page 3 held that:

"positive action by state officers and agencies is the contemplated prohibition of the (14th) Amendment. 43 Cornell L.Q. 375. Mr. Justice Bradley further stated that the wrongful act of an individual is not state action 'if not sanctioned in some way by the state, or not done under state authority. . . .'"

The evidence shows that the policy of the police was to prohibit sit-in demonstration. The evidence further shows on page 125 of the transcript that the manager had a [fol. 157] conference with Captain Cutrera of the New Orleans Police Department prior to giving any instructions to the defendants about leaving.

Bill of Exception No. 2 was taken when the Trial Judge refused the defendants the right to introduce evidence showing that the refusal was a result of police action.

This Court was in error in failing to find that this refusal was prejudicial to the defendants.

Wherefore, petitioners pray that this Court grant a re-hearing to Sydney L. Goldfinch, Jr., Rudolph Lombard, Oretta Castle and Cecil Carter, Jr.

John P. Nelson, Jr., Louis E. Eli, Nils R. Douglas,  
Robert F. Collins, Attorneys for Petitioners, By:  
John P. Nelson, Jr.

*Duly sworn to by John P. Nelson, Jr., jurat omitted in printing.*

[fol. 158]

## IN THE SUPREME COURT OF THE STATE OF LOUISIANA

## ORDER REFUSING APPLICATION FOR REHEARING—

October 4, 1961

Court was duly opened, pursuant to adjournment. Present, Their Honors: John B. Fournet, Chief Justice, Joe B. Hamiter, Frank W. Hawthorne, E. Howard McCaleb, Walter B. Hamlin, Joe W. Sanders and Frank W. Summers, Associate Justices.

Action by the Court on Applications for Rehearing Rehearings were refused in the following cases:

45,491 State v. Goldfinch, Jr., et al.

[fol. 165] Clerk's Certificate (omitted in printing).

[fol. 166]

## SUPREME COURT OF THE UNITED STATES

No. 638, October Term, 1961

RUDOLPH LOMBARD, et al., Petitioners,

vs.

LOUISIANA.

## ORDER ALLOWING CERTIORARI—June 25, 1962

The petition herein for a writ of certiorari to the Supreme Court of the State of Louisiana is granted, and the case is transferred to the summary calendar. The case is set for argument to follow No. 387.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this petition.

Office-Supreme Court, U.S.  
FILED

DEC 28 1961

JOHN F. DAVIS, CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM—1961

No. ~~603~~

RUDOLPH LOMBARD, ET AL.,

Petitioners,

*versus*

STATE OF LOUISIANA.

PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE UNITED STATES.

JOHN P. NELSON, JR.,  
702 Gravier Building,  
535 Gravier Street,  
New Orleans 12, Louisiana;

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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM—1961

\_\_\_\_\_  
**No.** \_\_\_\_\_  
\_\_\_\_\_

RUDOLPH LOMBARD, ET AL.,

Petitioners,

*versus*

STATE OF LOUISIANA.

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE UNITED STATES.**  
\_\_\_\_\_

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered in the above-entitled case on June 29, 1961, rehearing denied October 4, 1961.

**CITATIONS TO OPINIONS BELOW.**

The trial judge for the Criminal District Court of Orleans Parish rendered written reasons for overruling the petitioners' motion to quash. These reasons, totaling 44 pages, are found on pages 32 through 76 of the transcript. No written or oral reasons were given

by the trial judge when he found the defendants guilty. The opinion rendered by the Supreme Court of Louisiana is reported in 132 So. (2d) 860, as *State v. Goldfinch, et al.*

### JURISDICTION.

The judgment of the Supreme Court of Louisiana was entered on June 29, 1961. The jurisdiction of this Court is invoked under 28 U. S. C., § 1257(3), petitioners claiming rights, privileges and immunities under the Fourteenth Amendment to the Constitution of the United States.

### QUESTIONS PRESENTED.

Petitioners, three Negro students and one white student, acting in concert, sat down and sought food service at a lunch counter which served only white people in a public establishment which welcomed their trade without racial discrimination at all counters but that lunch counter; for that they were arrested and convicted of "criminal mischief." Under the circumstances of the arrest and trial were the petitioners deprived of rights protected by the

1. Due process clause of the Fourteenth Amendment in that they were convicted on a record barren of any evidence of guilt;
2. Due process clause of the Fourteenth Amendment in that they were convicted under a penal provision which was so indefinite and vague as to afford no ascertainable standard of criminality;
3. Due process and equal protection clauses of the Fourteenth Amendment to the United States Con-

stitution in that they were arrested and convicted to enforce Louisiana's state policy of racial discrimination;

4. Due process clause of the Fourteenth Amendment, as that clause incorporates First Amendment type protection of liberty of speech and expression;
5. Due process clause of the Fourteenth Amendment in that the trial judge refused petitioners the right to introduce evidence showing that the store owners were acting in concert with and/or in behalf of municipal and state law enforcement agencies and officers;
6. Due process clause of the Fourteenth Amendment in that the trial judge allowed the state to introduce hearsay evidence over defendants' objection, which evidence was used to furnish one of the necessary elements in the alleged crime;
7. Due process clause of the Fourteenth Amendment in that the trial judge continued to ask state witnesses leading questions dealing with material and relevant facts over the objection of defendants.

### **STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.**

1. The Fourteenth Amendment to the Constitution of the United States.

2. The Louisiana statutory provision involved is LSA-R. S. 14:59 (6):

"Criminal mischief is the intentional performance of any of the following acts: \* \* \*

"(6) taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of said business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business.

"Whoever commits the crime of criminal mischief shall be fined not more than five hundred dollars, or imprisoned for not more than one year, or both."

### STATEMENT.

SEPTEMBER 10, 1960—A group of Negroes conducted a "sit-in" demonstration at Woolworth's Department Store in the City of New Orleans. This was a peaceful demonstration and was the first of its kind to take place in the city.

SEPTEMBER 10, 1960—Later the same day, Superintendent of Police for the City of New Orleans issued a statement (Appellant II) which was highly publicized in the newspapers. It was also carried on TV and radio. The statement read as follows:

"The regrettable sit-in activity today at the lunch counter of a Canal St. chain store by several young white and Negro persons causes me to issue this statement to the citizens of New Orleans.

"We urge every adult and juvenile to read this statement carefully, completely and calmly.



"First, it is important that all citizens of our community understand that this sit-in demonstration was initiated by a very small group.

"We firmly believe that they do not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population.

"We believe it is most important that the mature responsible citizens of both races in this city understand that and that they continue the exercise of sound, individual judgment, goodwill and a sense of personal and community responsibility.

"Members of both the white and Negro groups in New Orleans for the most part are aware of the individual's obligation for good conduct—an obligation both to himself and to his community. With the exercise of continued, responsible law-abiding conduct by all persons, we see no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans.

"At the same time we wish to say to every adult and juvenile in this city that the police department intends to maintain peace and order.

"No one should have any concern or question over either the intent or the ability of this department to keep and preserve peace and order.

"As part of its regular operating program, the New Orleans police department is prepared to take prompt and effective action against any person or group who disturbs the peace or creates disorder on public or private property.

"We wish to urge the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest.

"Finally, we want everyone to fully understand that the police department and its personnel is ready and able to enforce the laws of the City of New Orleans and the State of Louisiana."

SEPTEMBER 13, 1960—De Lesseps Morrison, then mayor of the City of New Orleans, issued a highly publicized statement (Appellant I) setting forth the city's policy of handling these peaceful demonstrations. The statement reads in part as follows:

"I have today directed the Superintendent of Police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted."

\* \* \* \* \*

"It is my determination that the community interest, the public safety, and the economic welfare of this City require that such demonstrations cease and that henceforth they be prohibited by the Police Department."

SEPTEMBER 17, 1960—The defendants, three Negroes and one white, acting in concert (Tr. p. 133) in an orderly and quiet manner (Tr. pp. 103, 107), at approximately 10:30 a. m., requested to be served food at the "white" refreshment bar in McCrory's Five and Ten Cent Store, 1005 Canal Street, New Orleans, La. Be-

cause three were Negroes, all were refused service. (Tr. p. 117.)

The continued presence at the "white" counter of the defendants, after refusing to move to the "colored" counter (Tr. p. 100) was considered by Mr. Graves, restaurant manager, as an "unusual circumstance" (Tr. p. 103), or an "emergency" (Tr. p. 100), hence he ordered the counter closed down (Tr. p. 100) and called the police (Tr. p. 101).

After the police arrived on the scene, and after a conference with Captain Lucien Cutrera of the New Orleans Police Department (Tr. p. 125), Mr. Wendell Barrett, in a loud voice, told the defendants that the department was closed and requested them to leave the department (Tr. p. 110). When they did not answer or comply with the request, Major Edward Ruther, a member of the New Orleans Police Department, gave the defendants two minutes within which to leave. (Tr. p. 115.) After waiting approximately six minutes, the defendants were placed under arrest (Tr. p. 122), charged and convicted under R. S. 14:59 (6).

McCrory's, at 1005 Canal Street, is part of a national chain operating in thirty-four states, owned by the McCrory Stores, Incorporated. (Tr. p. 22.) It is classified as a "variety of merchandise" type store (Tr. p. 109), made up of approximately twenty departments (Tr. p. 119) and open to the general public (Tr. p. 21). Included in its services to the public are eating facilities composed of a main restaurant that seats 210, a counter that seats 53, a refreshment bar that seats 24 and two stand-up

counters. (Tr. p. 99). All of the eating facilities are segregated. There are no signs indicating whether service at any particular counter is limited to either Negro or white. (Tr. pp. 106, 107.)

Mr. Barrett, the manager at McCrory's for the past two and one-half to three years (Tr. p. 21), had previously served as manager for the McCrory stores in Savannah and Valdesta, Georgia. (Tr. p. 21.) He has never been employed in a "desegregated" McCrory store. (Tr. p. 24.)

The store's segregation policy is determined by local tradition, law and custom, as interpreted by the manager. (Tr. p. 24.) The manager, Mr. Barrett, testified that his decisions relative to segregated lunch counters within the store conform to state policy, practice and custom. (Tr. p. 28.)

## **HOW THE FEDERAL QUESTIONS ARE PRESENTED.**

The federal questions sought to be reviewed here were raised in the court of first instance (the Criminal District Court for the Parish of Orleans, Section "E") on the 17th day of October, 1960, by petitioners' timely motion to quash the information. (Tr. p. 9.) Among other allegations, the motion contains the following:

"2. That the said defendants are being deprived of their rights under the 'equal protection and due process' clauses of both the Constitution of Louisiana and of the United States of America, in that the said law under which the Bill of Information is founded is being enforced against

them arbitrarily, capriciously and discriminately, in that it is being applied and administered unjustly and illegally, and only against persons of the Negro race and/or white persons who act in concert with members of the Negro race.

"7. That the refusal to give service solely because of race, the arrest and subsequent charge are all unconstitutional acts in violation of the Fourteenth Amendment of the United States Constitution, in that the act of the Company's representative was not the free will act of a private individual, but rather an act which was encouraged, fostered and promoted by state authority in support of a custom and policy of enforced segregation of race at lunch counters.

"8. That the arrest, charge and prosecution of the defendants are unconstitutional, in that they are the result of state and municipal action, the practical effect of which is to encourage and foster discrimination by private parties."

The motion was argued, submitted and denied on November 28, 1960, to which ruling petitioners objected and reserved a formal bill of exception.

Petitioners' case came on for trial on the seventh day of December, 1960. Following the verdict of guilty, a motion for a new trial (Tr. p. 76) and a motion in arrest of judgment (Tr. p. 80) were filed, which motions alleged, *inter alia* (Tr. p. 77):

"The verdict is contrary to the law in that:

"E. The evidence offered against defendants in support of the information charging them with violation of L. S. A.-R. S. 14:59(6) establishes that at the time of arrest and at all times covered by the charges, they were in peaceful exercise of constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in McCrory-McLennan Corp., an establishment performing an economic function invested with the public interest; that defendants were peacefully attempting to obtain service in the facilities of McCrory-McLennan Corp., in the manner of white persons similarly situated and at no time were defendants defiant or in breach of the peace and were at all times upon an area essentially public, wherefore defendants have been denied rights secured by the due process and equal protection clauses of the 14th Amendment of the United States Constitution;

"F. The evidence establishes that prosecution of defendants was procured for the purpose of preventing them from engaging in peaceful assembly with others for the purpose of speaking and otherwise peacefully protecting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in New Orleans to permit defendants and other members of the Negro race from enjoying the access to facilities and accommodations afforded members of other races; and that by this prosecution, prosecuting witnesses and arresting officers are attempt-

ing to employ the aid of the court to enforce a racially discriminatory policy contrary to the due process and equal protection clause of the 14th Amendment to the Constitution of the United States."

The motions for a new trial and to arrest the judgment were denied (Tr. p. 4), and petitioners filed forthwith a bill of exception, renewing all reservations, motions and bills of exception previously taken. (Tr. p. 84.)

Thereafter, on January 10, 1961, petitioners appealed to the Supreme Court of the State of Louisiana, and also urged during the course of that appeal that the verdict and the sentence deprived the petitioners of the equal protection afforded by the 14th Amendment to the United States Constitution.

Prior to trial on the merits, certain evidence was introduced in support of motion to quash and assertion of various constitutional defenses under the Fourteenth Amendment to the Constitution of the United States. The motion to quash was duly overruled.<sup>1</sup>

The case was subsequently fixed for trial and all petitioners found guilty.<sup>2</sup> They were each sentenced to pay a fine of \$350.00 and imprisonment in Parish Prison for sixty (60) days, and in default of the payment of fine to imprisonment in Parish Prison for sixty (60)

<sup>1</sup> See pages 32 through 76 of the transcript for the written judgment of trial judge setting forth the reasons for overruling the motion to quash.

<sup>2</sup> No written or oral reasons were given by the trial judge when he found the petitioners guilty.



days additional. Motion for new trial was made and denied. The matter was appealed to the Supreme Court of Louisiana, where the conviction was affirmed and rehearing denied. Application for stay of execution for sixty (60) days was granted by the Chief Justice of the Louisiana Supreme Court on October 6, 1961.

## **REASONS FOR GRANTING THE WRIT.**

### **I.**

#### **The Decision Below Conflicts With Decisions of This Court on Important Issues Affecting Federal Constitutional Rights.**

A. The decision below conflicts with prior decisions of this Court which condemn racially discriminatory administration of State criminal laws.

1. The person in charge of the place of business, in ordering defendants to leave, did not thereby perform a purely private act; rather he acted for the state, under the terms of the statute, in order to comply with the policy of segregation established by the legislative and executive officers of the state.

His act is comparable to that of individuals holding no state office who challenged the voters' registration of 1,377 Negroes in Washington Parish, La., under provisions of Louisiana statutes. "The individual defendants, in challenging the registration status of voters, were acting under color of the laws of Louisiana. Providing for and supervising the electoral process is a state function. *Terry v. Adams*, 345 U. S. 461, 73 S. Ct. 809, 97 L. Ed. 1152. The individual defendants participated

in this state function, under express authority of Louisiana law, using state facilities made available to them. LSA-R. S. 18:245. Their actions formed the basis of the removal of citizens from the registration rolls by the defendant Registrar acting in his official capacity. See *Shelley v. Kraemer*, 334 U. S. 1, 20, 68 S. Ct. 836, 92 L. Ed. 1161; *United States v. McElveen*, 180 F. Supp. 10 (E. D. La., 1960), *aff'd sub nom United States v. Thomas*, 362 U. S. 58 (1960).

By analogy, the person in charge of McCrory's acted under express authority of a Louisiana statute when he ordered the defendants to move, and thereby participated in the state function of maintaining order in places where the public gathers. His action formed the basis of their arrest. The only facilities used in the *McElveen* case were the files in the registration office. In the instant case, the police power was used with its facilities. His act was as much under color of law as was the act of the individuals enjoined in the *McElveen* case.

2. His act was not a private one for the additional reason that it was not a free will act of a private individual, but rather an act encouraged, fostered and promoted by state authority in support of a custom and policy of enforced segregation of races at lunch counters.

The state action limited by the Fourteenth Amendment is not only that of public officers or with public funds or on public property. It includes private operations under many circumstances. See *Abernathy, Expansion of the State Action Concept Under the Fourteenth*

*Amendment*, 43 Cornell L. 2. 375 (1958); *Shanks, State Action and the Girard Estate Cast*, 105 U. Pa. L. Rev. 213 (1956).

Unlike the situation in *Williams v. Howard Johnson's Restaurant*, 268 F. (2d) 845 (4th Cir., 1959), the state officers did not merely acquiesce in the custom of segregation but actually aided and abetted it, thereby making the private act take on the character of a public one. *Shelley v. Kraemer*, 334 U. S. 1 (1948); *Valle v. Stengel*, 176 F. (2d) 697 (3d Cir., 1949).

In Louisiana, custom and received usages have the force of law. La. R. C. C. Articles 3 and 21 (1870). If the custom is discriminatory and was applied by act of the person in charge of the store, then it can be called discrimination under the law. This is comparable to the attempt by another state to charge a defendant with the common law offense of inciting a breach of the peace, *Cantwell v. Connecticut*, 310 U. S. 296 (1940), or the application of a common law policy of a state forbidding resort to peaceful persuasion through picketing. *A. F. L. v. Swing*, 312 U. S. 321 (1941). Both these cases indicated that such customary activity could constitute state action.

The store manager acted not privately, but under the influence of the public policy expressed in the statute, the widespread custom of segregation in the community, and especially the expressed policy of city officials, in ordering the defendants to move, thereby denying them their constitutionally guaranteed rights.

3. The Fourteenth Amendment to the United States Constitution forbids state action which deprives persons of equal protection under the law.

As indicated above, state action is clearly present in the instant case, first, by the act of the person in charge of McCrory's in acting under authority of a statute and in acting as encouraged by state policy; second, by the act of the police in arresting defendants; third, by the act of the district attorney in charging defendants; and fourth, by the act of this Honorable Court in trying defendants' guilt.

However, state action is of course permissible unless it is wrongly used. It is not permissible under the Fourteenth Amendment if it deprives a person of any constitutionally protected right, including the right to equal protection under the law, and the right of free speech and the right to property.

Hence, if state action, that is, action under the law, deprives a person of equal protection, it is a violation of the Amendment.

a. The order to move, the arrest, the charge, the prosecution, and the trial of defendants constitute state action which denied these defendants equal protection as there was no reasonable basis for treating them differently from any other potential customer at the lunch counter, the only basis being their race, which is an irrelevant basis. True, their race could be sufficient basis for private discrimination, but not for state action.

b. Even if this broad inequality of treatment were not a sufficient deprivation of constitutionally protected right, other such rights have been harmed by state action. One such right is the right of free speech discussed elsewhere.

c. Another phase of equal protection guaranteed by the Constitution is the right to contract, or at least the right to attempt to enter into a contract in the same manner open to other persons similarly situated, which right is a necessary corollary of the right of property, that is, the right to attempt to acquire property as would other persons similarly situated, or, by contract. *Valle v. Stengel*, 176 F. (2d) 697 (3d Cir., 1949). The equal protection guarantee is the constitutional basis for 42 U. S. C. § 1981 which assures the right to make and enforce contracts and § 1982 which assures the right to purchase and otherwise transact concerning real and personal property. *Id.*; *Buchanan v. Worley*, 245 U. S. 60 (1917); *Hurd v. Hodge*, 334 U. S. 24 (1948). Cf. *Allgeyer v. Louisiana*, 165 U. S. 578 (1897).

Judicial enforcement of a discriminatory restrictive covenant unconstitutionally deprives a person of the equal right to acquire property. *Shelley v. Kraemer*, 334 U. S. 1 (1948). In that case, a third party was not permitted to use judicial power to enforce the restriction against two contracting parties, the Negro being a willing purchaser from a willing vendor. In *Valle v. Stengel*, the unwilling vendor was not permitted to use police power to prevent the willing buyer of a ticket to a privately owned swimming pool from "making" a contract.

Note, *Freedom to Contracts—A New Civil Right*, 59 Yale L. J. 1167 (1950).

Defendants wanted to buy lunch. True, the merchant was unwilling to contract and cannot be forced to do so. However, all other persons were free to attempt to contract with the store, but defendants were no longer free to offer to contract because of the interference of the police and other state action. It takes two parties to "make" a contract, but the first necessary element of a contract is an offer. The Constitution in guaranteeing equal protection and property rights does not guarantee that an offer will be accepted and a contract effected, but it puts all persons on an equal footing in denying the right of a state to interfere with the process of contracting, including the right to make an offer. If a white person attempts to buy lunch at McCrory's counter and is refused, along with all other potential customers similarly situated, because the closing hour of the store is approaching and waitresses must clean up before leaving with the other employees, that white potential customer can return at another time of day and make another offer, trying again to make a contract. But defendants are deprived forever of the opportunity of making an offer to try to make a contract due to State interference with their equal right to enter into the contracting procedure preliminary to acquiring property. Property rights are constitutionally protected. Defendants' property rights have been harmed.

4. The fact that the limitation on defendants' freedom occurred on privately owned property does not cause the deprivation of equal protection to be any less uncon-



stitutional—first, because as explained, the fact of ordering, arresting, charging, prosecution and trying, all constitute State action; second, because the fact that the store has been the kind that advertises widely and admits the general public without discrimination causes it to be a *quasi* public place. "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. *Republic Aviation Corp. v. Labor Board*, 324 U. S. 793, 802 n. 8. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation, and . . . such regulation may not result in an operation of these facilities, even by privately owned companies, which unconstitutionally interferes with and discriminates against interstate commerce." *Marsh v. Alabama*, 326 U. S. 501 (1946). In that case, the state punished the crime of disturbing religious literature contrary to the wishes of the owner of town under "Title 14, § 426 of the 1940 Alabama Code which makes it a crime to enter or remain on the premises of another after having been warned not to do so." The conviction was reversed and remanded as being an unconstitutional deprivation by state action of freedom of speech as an element of due process and equal protection.

In *Valle v. Stengel*, 176 F. (2d) 697 (3d Cir. 1949), the arrest and eviction took place on a privately owned



amusement park to which all the public were admitted and patronage to which was encouraged through advertising. The negroes and the white person acting in concert with them, after being admitted to the park, were refused admission to the pool. The manager was aided and abetted by the police whom he called, so that the police act was attributed to the corporation and its manager and treated as their own. This state action was held to constitute a deprivation of equal protection of the right to contract in pursuit of happiness through use of property.

This is closely comparable to the situation of defendants, admitted to the store but not to the counter.

B. The decision below conflicts with decisions of this Court securing the Fourteenth Amendment right to freedom of expression.

1. Defendants' presence at the lunch counter was a form of expression, a mean of communication; in the broad sense, it was "speech."

"Speech" protected by the United States Constitution includes modes of expression other than by voice or by press. It includes "a significant medium for the communication of ideas." *Joseph Burstyn, Inc., v. Wilson*, 343 U. S. 495 (1952). It includes activity forbidden by a statute making it a misdemeanor to "go near to or loiter about the premises or place of business of such other persons . . ." It includes such activity "in appropriate places" even though the picketing was on grounds of a privately owned business. *Thornhill v. Alabama*, 310 U. S. 88, 106 (1940).

Speech in the form of boycotting is protected. *Giboney v. Empire Storage and Ice Co.*, 336 U. S. 490 (1949). This is true also when it is used to end discriminatory labor practices. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552 (1938).

"Speech" in the form of "unfair" lists, picketing to deter showing a certain motion picture, to deter operating shops on Sunday, and to indicate a shop is not Kosher, has been held to be protected free speech by courts of other states.

Defendants' act did not constitute such speech as must be limited; it did not incite to riot as in *Feiner v. New York*, 340 U. S. 315 (1951); rather it was subject to protection even had it created dissatisfaction with conditions as they are, as in *Terminiello v. Chicago*, 337 U. S. 1 (1949).

Hence defendants' act in sitting quietly in a place of business, for the purpose of expressing disapproval of a policy of racial discrimination practiced there, constituted a form of speech. As such it is protected against interference by the state.

2. "The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state." *Schneider v. State*, 308 U. S. 147 (1939).

When agents of the state (police officers, the district attorney, this Honorable Court) arrested, charged and tried defendants under La. R. S. 14:59(6) (1960),

thereby preventing defendants from continuing their expression of disapproval of policy of racial discrimination by the management of the lunch counter, the State deprives defendants of an element of liberty guaranteed to them under the Fourteenth Amendment against such state action.

Hence, even if it be conceded *arguendo* that the statute might be constitutionally enforced in other circumstances, it may not be so when its enforcement limits a form of communication of ideas, as has been done in the present instance.

Rather than being arrested for their expression of opinion, defendants had a right to expect police protection to preserve order. *Sellers v. Johnson*, 163 F. (2d) 877, (8th Cir. 1947), cert. denied, 332 U. S. 851 (1948).

C. The decision of the trial judge in refusing the petitioners an opportunity to establish actual concert between the store proprietor and the police violated petitioners' right to a fair and impartial trial as guaranteed by the Fourteenth Amendment.

The trial judge refused to allow the petitioners to introduce evidence which would tend to show concerted action between the State law enforcement officers and McCrory's store manager. (See Bill of Exception No. 2, page 85 of transcript.) The highly publicized statement of both the Mayor of the City of New Orleans, *supra*, page 6, and the Chief of Police, *supra*, page 4, form an important backdrop within which to decide this issue.

This expression of policy by the Mayor and the Superintendent of Police of the City of New Orleans oper-

ated as a prohibition to all members of the Negro race from seeking to be served at lunch counters whether or not the proprietor was willing to serve them. More in point, the pronouncement of policy by the leaders of the municipal authority operated to constructively coerce the proprietors of business establishments not to integrate lunch counters at the risk of suffering municipal censure or punishment.

The Supreme Court, in *Civil Rights Cases*, 109 U. S. 3, 17, 27 L. Ed. 835, 841, 3 Supreme Court 18, ruled that racial discriminations which are merely the wrongful acts of individuals can remain outside the ban of the Constitution only so long as they are unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. In order to successfully attack the administration of the statute, it was necessary that defendants prove concert between the store manager and the police. This was relevant evidence, the exclusion of which was prejudicial to the defendants as it deprived them of the only means they had to show that they were the victims of prohibited state action rather than protected personal rights of the proprietor.

## II.

### **The Public Importance of the Issues Presented.**

A. This case presents issues posed by numerous similar demonstrations throughout the nation which have resulted in widespread desegregation and also in many

similar cases now pending in the state and federal courts. Petitioners need not multiply citations to demonstrate that during the past year thousands of students throughout the nation have participated in demonstrations like those for which petitioners have been convicted.

A comprehensive description of these "sit-in" protests appears in *Pollitt, Dime Store Demonstration: Events and Legal Problems of the First Sixty Days*, 1960 Duke Law Journal 315 (1960). These demonstrations have occurred in Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, South Carolina, Tennessee, Texas, Virginia and elsewhere. *Pollitt, supra, passim*.

In a large number of places this nationwide protest has prompted startling changes at lunch counters throughout the South, and service is now afforded in many establishments on a nonsegregated basis. The Attorney General of the United States has announced the end of segregation at public lunch counters in 69 cities, *New York Times*, August 11, 1960, page 14, col. 5 (late city edition), and since that announcement the number of such cities has risen above 112, *New York Times*, Oct. 18, 1960, page 47, col. 5 (late city edition).

In many instances, however, these demonstrations, as in the case at bar, have resulted in arrests and criminal prosecutions which, in their various aspects, present as a fundamental issue questions posed here, that

is, may the state use its power to compel racial segregation in private establishments which are open to the public and to stifle protests against such segregation. Such cases having been presented to the Supreme Court of Appeals of Virginia,<sup>3</sup> the Supreme Court of North Carolina,<sup>4</sup> the Supreme Court of Arkansas,<sup>5</sup> the Court of Criminal Appeals of Texas,<sup>6</sup> the Court of Appeals of Alabama,<sup>7</sup> the Court of Appeals of Maryland,<sup>8</sup> several South Carolina appellate courts,<sup>9</sup> and the Georgia Court of Appeals.<sup>10</sup> Numerous other cases are pending at the trial level.

It is, therefore, of widespread public importance that the Court consider the issues here presented so that

<sup>3</sup> *Raymond B. Randolph, Jr., v. Commonwealth of Va.* (No. 5233, 1960).

<sup>4</sup> *State of N. C. v. Fox and Sampson* (No. 442, Supreme Court, Fall Term, 1960).

<sup>5</sup> *Chester Briggs, et al., v. State of Arkansas* (No. 4992) (consolidated with *Smith v. State of Ark.*, No. 4994, and *Lupper v. State of Ark.*, No. 4997).

<sup>6</sup> *Briscoe v. State of Texas* (Court of Crim. App., 1960, No. 32347) and related cases (decided Dec. 14, 1960; conviction reversed on ground that indictment charging in alternative invalid for vagueness).

<sup>7</sup> *Bessie Cole v. City of Montgomery* (3rd Div. Case No. 57) (together with seven other cases, Case Nos. 58-64).

<sup>8</sup> *William L. Griffin, et al., v. State of Maryland*, No. 248, September Term 1960 (two appeals in one record); see related civil action sub nom. *Griffin, et al., v. Collins, et al.*, 187 F. Supp. 149 (D.C. D.Md. 1960).

<sup>9</sup> *City of Charleston v. Mitchell, et al.*, (Court of Gen. Sess. for Charleston County) (appeal from Recorders Ct.); *State v. Randolph, et al.*, (Court of Gen. Sess. for Sumter County) (appeal from Magistrates Ct.); *City of Columbia v. Bouie, et al.*, (Court of Gen. Sess. for Richland County) (appeal from Recorders Ct.).

<sup>10</sup> *M. L. King, Jr., v. State of Georgia* (two appeals: No. 38648 and No. 38718).

the lower courts and the public may be guided authoritatively with respect to the constitutional limitations on state prosecutions for engaging in this type of protest.

B. The holding below, if allowed to stand, will in effect undermine numerous decisions of this Court striking down state enforced racial discrimination. For example, the discrimination on buses interdicted by the Constitution in *Gayle v. Browder*, 352 U. S. 903, aff'd 142 F. Supp. 707, could be revived by convictions for disturbing the peace. In the same manner, state enforced prohibitions against members of the white and colored races participating in the same athletic contests, outlawed in *Dorsey v. State Athletic Commission*, 168 F. Supp. 149, aff'd 359 U. S. 533, could be accomplished. Indeed, segregation of schools, forbidden by *Brown v. Board of Education*, 347 U. S. 483, and innumerable cases decided since that time, especially those affecting Louisiana, e. g., *Orleans Parish School Board v. Bush*, 242 F. (2d) 156 (5th Cir. 1957), cert. denied 354 U. S. 921, might also be accomplished by prosecutions for disturbing the peace even though no disturbances in fact occurred.

The holding below, if allowed to stand, would be completely subversive of the numerous decisions throughout the federal judiciary outlawing state-enforced racial distinctions. Indeed, the segregation here is perhaps more invidious than that accomplished by other means for it is not only based upon a vague statute which is enforced by the police according to their personal notions of what con-



stitutes a violation and then sanctioned by state courts but it suppresses freedom of expression as well.

# **CONCLUSION.**

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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**IN THE**  
**SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM—1961**

**No. 58**

**RUDOLPH LOMBARD, ET AL.,**  
**Petitioners,**

**STATE OF LOUISIANA.**

**APPENDIX TO THE PETITION FOR WRIT OF CER-**  
**TIORARI TO THE SUPREME COURT OF THE**  
**STATE OF LOUISIANA.**

**JOHN P. NELSON, JR.,**  
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**New Orleans, Louisiana,**  
**Attorneys for Petitioners.**

# **APPENDIX**

---

**APPENDIX TO THE PETITION FOR WRIT OF CER-  
TIORARI TO THE SUPREME COURT OF THE  
STATE OF LOUISIANA.**

SUPREME COURT  
STATE OF LOUISIANA

---

NO. 45,491

STATE OF LOUISIANA

VS.

SIDNEY LANGSTON GOLDFINCH, JR.,  
RUDOLPH LOMBARD, ET AL.

---

APPEAL FROM THE CRIMINAL DISTRICT COURT  
PARISH OF ORLEANS

HONORABLE J. BERNARD COCKE, JUDGE  
SUMMERS, Justice

The four defendants herein, a white and three Negroes, were jointly charged in a bill of information filed by the District Attorney of Orleans Parish with criminal mischief in that on September 17, 1960, they took possession of the lunch counter at McCrory's Store, and remained there after being ordered to leave by the manager in violation of the provisions of Title 14, Section 59 of the Revised Statutes of the State of Louisiana, the pertinent portions of which provide:

"Criminal mischief is the intentional performance of any of the following acts:

\* \* \*

(6) Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

The defendants entered McCrory's store in New Orleans on the morning in question and took seats at one of the counters therein. McCrory's is part of a national chain operating in thirty-four states, owned by McCrory Stores, Incorporated. The New Orleans establishment is classified as a "variety merchandise" type store, made up of approximately twenty departments and open to the general public. Included in its services to the public are eating facilities composed of a main restaurant that seats 210, a counter for colored persons that seats 53, a refreshment bar that seats 24, and two stand-up counters.

The defendants were refused service at the counter where they were seated and which was reserved for whites, the manager was called, the counter was closed, and the defendants were requested to leave - - in accordance with the policy of the store, fixed and determined by the manager in catering to the desires of his customers - - or to seek service at a counter in the store providing service for Negroes. Upon their refusal, the police, who had been summoned by the manager, arrested them. They were subsequently tried and convicted of having violated the foregoing statute.

Defendants filed a motion to quash, motion for a new trial and a motion in arrest of judgment, all of which were overruled, and objected to the refusal of the Court to permit the introduction of certain evidence to which bills of exceptions were reserved.

These motions and bills of exceptions pertain primarily to the contention of defendants that the statute under which they were convicted, in its application against Negroes, is unconstitutional and discriminatory in that it denies to them the guarantees afforded by the Due Process and Equal Protection clauses of the Constitution of the United States and the Constitution of the State of Louisiana, particularly that afforded by the Fourteenth Amendment to the Constitution of the United States.

There should be no doubt, and none remains in our minds, about the applicability of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the state rather than private persons. The second sentence contains the phrases, "No State shall make or enforce any law \* \* \*" and "nor shall any State deprive any person \* \* \*."

Since the decision in the Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 835, 3 S. Ct. 18, it has been unequivocally understood that the Fourteenth Amendment covers state action and not individual action. Mr. Justice Bradley, speaking for the majority in these cases, stated:

"The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States \* \* \*."

"It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."

The foregoing concrete language indicates emphatically that positive action by state officers and agencies is the contemplated prohibition of the amendment 43 Cornell L.Q. 375. Mr. Justice Bradley further stated that the wrongful act of an individual is not state action "if not sanctioned in some way by the State, or not done under State authority. \* \* \*." This proposition has been constantly reiterated by the highest court of our land. In *Shelley v. Kraemer*, 334 U. S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, it was stated thusly: "Since the decision of this Court in the Civil Rights Cases, 109 U. S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

We are, therefore, called upon to determine whether the enactment of the questioned statute is such action by the State as is prohibited by the Fourteenth Amendment. In this connection it is recognized that the enactment of a statute which on its face provides for discrimination based upon race or color is a violation of the Fourteenth Amendment and constitutes state actions which that constitutional amendment prohibits.

A reading of the statute readily discloses that it makes no reference to any class, race or group and applies



to all persons alike, regardless of race. It confers no more rights on members of the white race than are conferred on members of the Negro race, nor does it provide more privileges to members of the white race than to members of the Negro race. *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845. The statute under consideration here stands no differently than does one imposing a penalty upon a person who enters without right the posted lands of another. It is not such a law as would be marked with the characteristic that it has been promulgated by our State for a special design against the race of persons to which defendants belong. To the contrary it is such a law that finds widespread acceptance throughout America. It is a legislative recognition of rights accorded to the owners of property similar to those found in almost all states of our nation. Mr. Justice Black in *Martin v. City of Struthers*, 319 U. S. 141, 87 L. Ed. 1313, 63 S. Ct. 862, referring to a statute of Virginia similar in scope to that here involved, said: "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more."

Not being impressed with features which would make it as discriminatory and a fortiori unconstitutional,<sup>1</sup>

<sup>1</sup> *Buchanan v. Warley*, 245 U.S. 60, 62 L. Ed. 149, 38 S. Ct. 16; *Fleming v. South Carolina Electric and Gas Co.*, 224 F. (2d) 752, appeal dismissed, 351 U.S. 901; *Browder v. Gayle*, 142 F. Supp. 707, affirmed, 352 U.S. 903; *Evers v. Dwyer*, 358 U.S. 202, 3 L. Ed. (2d) 222, 79 S. Ct. 178; *Dorsey v. State Athletic Comm.*, 168 F. Supp. 149, appeal dismissed and certiorari denied, 359 U.S. 533.

we conclude that the constitutionality of the statute must be presumed. *State v. Winehill & Rosenthal*, 147 La. 781, 86 So. 181, writ of error dismissed 258 U. S. 605; *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 68 L. Ed. 748, 44 S. Ct. 391; *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331, 72 L. Ed. 303, 48 S. Ct. 194; *State v. Grosjean*, 182 La. 298, 161 So. 871; *State v. Saia*, 212 La. 868, 33 So. 2d 665; *Schwegmann Bros. v. La. Board of Alcoholic Beverage Control*, 216 La. 148, 43 So. 2d 248; *Olivedell Planting Co. v. Town of Lake Providence*, 217 La. 621, 47 So. 2d 23; *Jones v. State Board of Education*, 219 La. 630, 53 So. 2d 792; *State v. Romes*, 223 La. 839, 67 So. 2d 99; *State v. McCrory*, 237 La. 747, 112 So. 2d 432; *Michon v. La. State Board of Optometry Examiners*, 121 So. 2d 565; 11 Am. Jur., Const. Law, Sec. 97.

Furthermore, courts will not hold a statute unconstitutional because the legislature had an unconstitutional intent in enacting the statute which has not been shown here. *Doyle v. Continental Insurance Co.*, 94 U. S. 535, 24 L. Ed. 148; *Daniel v. Family Security Life Ins. Co.*, 336 U. S. 220, 93 L. Ed. 632, 69 S. Ct. 550; *State v. County Comm.*, 224 Ala. 229, 139 So. 243; *Morgan v. Edmondson*, 238 Ala. 522, 192 So. 274. The courts will test a statute as it stands, without considering how it might be enforced. *James v. Todd*, 267 Ala. 495, 103 So. 2d 19, appeal dismissed, 358 U. S. 206; *Clark v. State*, 169 Miss. 369, 152 So. 820. Courts in considering constitutionality of legislation cannot search for motive. *Shuttlesworth v. Birmingham Board of Education*, 162 F. Supp. 372, affirmed, 358 U. S. 101.

Defendants further assert in their attack upon the statute that by content, reference and position of context it is designed to apply to, and be enforced in an arbitrary manner against, members of the Negro race and those acting in concert with them. In aid of this assertion certain House bills of the Louisiana Legislature for 1960, introduced in the same session with the contested statute, were offered in evidence.<sup>2</sup> All of these bills did not become law, but some did.<sup>3</sup> It is declared that this law and the others enacted during the same session were designed to apply to and be enforced against, in an arbitrary manner, members of the Negro race. We have carefully reviewed the provisions of these bills referred to which were enacted into law and nowhere in their content or context do we find that any of them seek to discriminate against any class, group, or race of persons. We therefore find no merit in this contention and, accordingly, dismiss it as being unsupported.

But the primary contention here, conceding the constitutionality of the statute on its face, has for its basis that the statute is unconstitutional in its application and the manager and employees of the store were acting in concert with the municipal police officers who made the arrest, the district attorney in charging defendants, and the court in trying defendants' guilt; that these acts constitute such state action as is contemplated by the prohibition of the Fourteenth Amendment. We have noted.

<sup>2</sup> See Official Journal of the Proceedings of the House of Representatives of the State of Louisiana, 23rd Regular Session, 1960, House Bills 343-366, inclusive.

<sup>3</sup> See Acts 68, 69, 70, 73, 76, 77, 78, 79, and 81, representing the only House Bills referred to in Footnote 1, which were enacted by the Legislature.

however, that in order for state action to constitute an unconstitutional denial of equal protection to the defendants here that action must provide for discrimination of a nature that is intentional, purposeful, or systematic. *Snowden v. Hughes*, 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397; *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624; *City of Omaha v. Lewis & Smith Drug Co.*, 156 Neb. 650, 57 N. W. 2d 269; *Zorack v. Clauson*, 303 N. Y. 161, 100 N. E. 2d 468; *State v. Anderson*, 206 La. 986, 20 So. 2d 288; *City of New Orleans v. Levy*, 233 La. 844, 98 So. 2d 210; 12 Am. Jur., *Constitutional Law*, Sec. 566. Nor is a discriminatory purpose to be presumed. *Terrance v. Florida*, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402.

The defendants sought to introduce evidence to establish that the action of the manager of McCrory's was provoked or encouraged by the state, its policy, or officers, and they would have this Court hold that this action of McCrory's was not its own voluntary action, but was influenced by the officers of the state. The conclusion contended for is incompatible with the facts. Rather, the testimony supports a finding that the manager of McCrory's had for the past several years refused service to Negroes, that the policy of the store was established by him, that he had set out the policy and followed it consistently; that Negroes had habitually been granted access to only one counter within the store and a deliberately provoked mischief and disturbance such as the one he complained of here had not previously occurred. In the past other Negroes who had mistakenly taken seats at the counter in question and who were told to move had

cooperated and recognized the requests of the McCrory's employees and had sat at the counter set aside for them.

Even under the provision of the questioned statute it is apparent that a prosecution is dependent upon the will of the proprietor, for only after he has ordered the intruder to relinquish possession of his place of business does a violation of the statute occur. The state, therefore, without the exercise of the proprietor's will can find no basis under the statute to prosecute.

These facts lead us to the conclusion that the existence of a discriminatory design by the state, its officers or agents, or by its established policy, assuming such could have been shown, would have had no influence upon the actions of McCrory's. The action of bringing about the arrest of the defendants, then, was the independent action of the manager of the privately owned store, uninfluenced by any governmental action, design, or policy - - state or municipal - - and the arrest was accomplished in keeping with McCrory's business practice established and maintained long before the occasion which defendants seek to associate with a discriminatory design by the state. Furthermore, it is quite clear from the oral argument of defense counsel that this prosecution was sought after and provoked by the defendants themselves, and in reality the conviction they have sustained is the result of their own contrivance and mischief and is not attributable to state action.

The business practice which McCrory's had adopted was recognized then and is now recognized by us to be a

practice based upon rights to which the law gives sanction. It has been expressed as follows:

"The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation \* \* \* The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants." See *State v. Clyburn*, 247 N. C. 455, 101 S. E. 2d 295, and authorities therein cited. This right of the operator of a private enterprise is a well-recognized one as defendants concede. "The rule that, except in cases of common carriers, innkeepers and similar public callings, one may choose his customers is not archaic." *Greenfield v. Maryland Jockey Club*, 190 Md. 96, 57 A. 2d 335.

The right to prevent a disturbance on one's private property and the right to summon law enforcement officers to enforce that right are rights which every proprietor of a business has whenever he refuses to deal with a customer for any reason, racial or otherwise, and the exercise of those rights does not render his action state action or constitute a conspiracy between the proprietor and the peace officer which would result in state action. *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124, affirmed, 284 F. 2d 746.

There is presently no anti-discrimination statute in Louisiana, nor is there any legislation compelling the

segregation of the races in restaurants or places where food is served. There being no law of this State, statutory or decisional, requiring segregation of the races in restaurants or places where food is served, the contention that the action of the officials here is discriminatory is not well-founded for that action is not authorized by state law.

The defendants have sought to show through evidence adduced at the trial that there is no integration of the races in eating places in New Orleans and, therefore, the custom of the state is one that supports segregation and hence state action is involved. This argument overlooks the fact that the segregation of the races prevailing in eating places in Louisiana is not required by any statute or decisional law of the State or other governmental body, but is the result of the business choice of the individual proprietors, both white and Negro, catering to the desires and wishes of their customers, regardless of what may stimulate and form the basis of the desires. *Slack v. Atlantic White Tower System, Inc., supra.*

To the same effect is the language of the Court in *Williams v. Howard Johnson's Restaurant, supra, viz.:*

"This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices.

• • •



"The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment."

The effect of the contentions of defendants is to urge us to disregard and ignore certain rights of owners and taxpayers in the enjoyment of their property, unaffected by any public interest, in order that they may impose upon the proprietor their own concept of the proper use of his property unsupported by any right under the law or Constitution to do so. We cannot forsake the rights of some citizens and establish rights for others not already granted by law to the prejudice of the former; this is a legislative function which it is not proper for this Court to usurp. *Tamalleo v. New Hampshire Jockey Club, Inc.*, 102 N. H. 547, 163 A. 2d 10. The fundamental propositions presented here are not novel; we treat them as settled and their change is beyond our province.

The conviction and sentence are affirmed.

Rehearing denied, Oct. 4, 1961.

### CERTIFICATE OF SERVICE

I hereby certify under Rule 33(3-b) that service has been made on the State of Louisiana, respondent, of this appendix to petition for certiorari, by serving a copy hereof by mailing same to Hon. Jack P. F. Gremillion, Attorney General of the State of Louisiana, addressed to him at his office in the State Capitol, Baton Rouge, La., and deposited first class postage prepaid in the main

office of the United States Post Office in the City of  
New Orleans, La.

New Orleans, La.

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1961

**No. 608**

**RUDOLPH LOMBARD, ET AL.,**

Petitioners,

*versus*

**STATE OF LOUISIANA.**

**RESPONSE TO THE PETITION FOR WRIT OF  
CERTIORARI TO THE SUPREME COURT  
OF THE UNITED STATES.**

**JACK P. F. GREMILLION,**

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**APPENDIX "A"**

**7**

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1961

---

**No. 638**

---

RUDOLPH LOMBARD, ET AL.,

Petitioners,

*versus*

STATE OF LOUISIANA.

---

**RESPONSE TO THE PETITION FOR WRIT OF  
CERTIORARI TO THE SUPREME COURT  
OF THE UNITED STATES.**

---

*May It Please the Court:*

TO THE HONORABLE, THE CHIEF JUSTICE AND  
THE ASSOCIATES OF THE SUPREME COURT  
OF THE UNITED STATES:

In accordance with Your Honors' request, we submit below the response to the petition for a writ of certiorari to the Supreme Court of the State of Louisiana.

(1)

We respectfully submit that the application for this writ has added nothing to the brief which was filed by attorneys for these defendants in the Louisiana Su-

preme Court and that they have failed to point out wherein any finding of fact upon which a conclusion of law was based or that any conclusion of law by the Louisiana Supreme Court is in error.

(2)

The questions presented on page two of the petition, paragraph one, is totally in error for, as shown by the second paragraph on page three of the appendix, the factual situation shows the record was replete with evidence of their guilt.

(3)

Paragraph two is answered by the statute itself, which shows there is nothing vague or indefinite about it.

(4)

Paragraph three of the questions presented is again absolutely untrue as the facts and the opinion of the Louisiana Supreme Court show that these defendants were requested to leave the premises in accordance with the policy of the store, fixed and determined by the manager in catering to the desire of his customers, and not as any part of an alleged policy of the State of Louisiana of racial discrimination, there being no such statutes of the State of Louisiana.

(5)

Paragraph four is a conclusion of law of the pleader and is not a complete statement of law as freedom of

speech and expression, under the decisions of this Court, can be limited.

(6)

Paragraphs five, six and seven have all been fully answered by the decision of the Louisiana Supreme Court and all of which were very fully and completely answered by the trial judge, Honorable J. Bernard Cocke, in giving his written reasons for overruling the motion to quash in pages 32 to 73 of the transcript which we have attached in printed form as Appendix "A," and included in the appendix Judge Cocke's *per curiams* to all of the bills of exceptions taken by the defendants.

(7)

On page 23, paragraph two of the application for the writ it is stated that "in a large number of places this nationwide protest has prompted startling changes at lunch counters throughout the South and service is now afforded in many establishments on a nonsegregated basis."

As shown on page 11 of the appendix by petitioners, the Louisiana Supreme Court points out there is no anti-discrimination statute in Louisiana nor is there any legislation compelling the segregation of the races in restaurants or places where food is served.

(8)

Inasmuch as we believe that the Louisiana Supreme Court has decided all the constitutional issues in this matter in accordance with the existing jurisprudence of Your



Honors, as shown in the opinions cited, the application for the writ should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE.**

I, M. E. Culligan, Member of the Bar of the Supreme Court of the United States, hereby certify that a copy of this Response to the Petition for Writ of Certiorari to the Supreme Court of the United States and the appendix thereto, has been mailed by United States mail, postage prepaid, to attorneys for the defendants, namely, John P. Nelson, Jr., 702 Gravier Building, 535 Gravier Street, New Orleans 12, Louisiana, and Lolis E. Elie, Nils R. Douglas, Robert F. Collings, 2211 Dryades Street, New Orleans, Louisiana.

Assistant Attorney General.

7

**APPENDIX "A"**

**DISTRICT COURT WRITTEN JUDGMENT ON  
MOTION TO QUASH.**

STATE OF LOUISIANA

VERSUS

SIDNEY L. GOLDFINCH, JR.

ET. AL.

NO. 168-520—

SECTION "E"

CRIMINAL DISTRICT

COURT

PARISH OF ORLEANS

**J U D G E M E N T**

The defendants, Rudolph Lombard, a colored male, Oretha Castle, a colored female, Cecil Carter, Jr., a colored male, and Sydney L. Goldfinch, Jr., a white male, are jointly charged in a bill of information which reads as follows:

"\* \* \* that on the 17th of September, 1960, each did wilfully, unlawfully and intentionally take temporary possession of the lunch counter and restaurant of McCrory's Store, a corporation authorized to do business in the State of Louisiana, located at 1005 Canal Street, and did wilfully, unlawfully and intentionally remain in and at the lunch counter and restaurant in said place of business after Wendell Barrett the manager, a person in charge of said business, had ordered the said Sydney Langston Goldfinch, Jr., Rudolph Joseph Lombard, Oretha Castle and Cecil Winston Carter, Jr., to leave the premises of said lunch counter and restaurant, and to desist from the temporary possession of same, contrary, etc."

The particular statute under which defendants are charged is L.S.A.-R.S. 14:59 (6) which reads as follows:

"Criminal mischief is the intentional performance of any of the following acts: \* \* \*

"(6) taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of said business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

The defendants moved the Court to quash the bill of information.

As cause for quashing the bill, defendants alleged "that movers were deprived of the due process of law and equal protection of law guaranteed by the Constitution and laws of the State of Louisiana and of the United States of America as follows:"

"(1) That the statutes under which the defendants are charged are unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United States of America, and in contravention of the Constitution of the State of Louisiana, in that they were enacted for the specific purpose and intent to implement and further the state's policy of enforced segregation of races."

"(2) That the said defendants are being deprived of their rights under the "equal protection and due

process" clauses of both the Constitution of Louisiana and of the United States of America in that the said laws under which the bill of Information is being enforced against them arbitrarily, capriciously and discriminately, in that it is being applied and administered unjustly and only against persons of the Negro race and or white persons who act in concert with members of the Negro race.'

"(3) That the statutes under which the prosecution is based and the Bill of Information founded thereon, are both so vague, indefinite and uncertain as not to establish an ascertainable standard of guilt.'

"(4) That the statutes under which the prosecution is based, exceed the police power of the state in that they have no real, substantial or rational relation to the public safety, health, morals, or general welfare, but have for their purpose and object, governmentally sponsored and enforced separation of races, thus, denying the defendants their rights under the first, thirteenth and fourteenth Amendment to the United States Constitution and art. I Section 2 of the Louisiana Constitution.'

"(5) That the bill of information on which the prosecution is based, does nothing more than set forth a conclusion of law, and does not state with certainty and sufficient clarity the nature of the accusation.'

"(6) That the statutes deprive your defendants of equal protection of the law in that it excludes from

its provisions a certain class of citizen, namely those who are at the time active with others in furtherance of certain union activities.'

"(7) That the refusal to give service because of race, the arrest and subsequent charge are all unconstitutional acts in violation of the Fourteenth Amendment of the United States Constitution in that the act of the Company's representative was not the free will act of a private citizen but rather an act which was encouraged, fostered and promoted by state authority in support of a custom and policy of enforced segregation of races at lunch counters.'

"(8) That the arrest, charge and prosecution of defendants are unconstitutional, in that it is the result of state and Municipal action, the practical effect of which is to encourage and foster discrimination by private parties."

In support of their motion to quash, the defendants offered the testimony of the following named witnesses, deLesseps S. Morrison, Mayor of the City of New Orleans, Joseph I. Giarrusso, Superintendent of Police, and Wendell Barrett, Manager of McCrory's 5 and 10 Cents Store.

The Mayor testified in substance as follows:

That the Superintendent of Police serves under his direction: that he and the City Government "set the lines or direction of policy to the police department."

That a statement appearing in the Times-Picayune dated September 13, 1960, page 7 of Section 1, was an

accurate report of a statement issued by him following the initial "sit-in" and follow up demonstration at the F. W. Woolworth Store on September 9, 1960.

The essence of the Mayor's statement filed in evidence was, that he had directed the superintendent of police not to permit any additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers; that it was his determination that the community interest, the public safety, and the economic welfare of the city required that such demonstrations cease and that they be prohibited by the police department.

The Mayor further testified:

That he did not know of any places in the City of New Orleans, where whites and negroes were served at the same lunch counter.

The Superintendent of Police identified as accurate a statement of his appearing in the Times-Picayune, Page 18, Section 1, dated September 10, 1960; that his reason for issuing the statement was that a recurrence of the sit-in demonstration as had occurred at the Woolworth Store on September 9, 1960, would provoke disorder in the community.

In his statement, the Superintendent of Police, made known that his department was prepared to take prompt and effective action against any person or group who disturbed the peace or created disorders on public or private property. He also exhorted the parents of both white and negro students who participated in the



Woolworth Store "sit-in" demonstration to urge upon these young people that such actions were not in the community interest; etc.

He further testified that as a resident of the City of New Orleans and as a member of the police department for 15 years, he did not know of any public establishment that catered to both white and negro at the same lunch counter.

Mr. Wendell Barrett testified, that he was and had been the Manager of McCrory's 5 and 10 Cents Store in the City of New Orleans for about 3 years; that the store was made up of individual departments, and catered to the general public.

That the policy of McCrory's national organization as to segregated lunch counters, was to permit the local manager discretion to determine same, consideration being had for local tradition, customs and law, as interpreted by the local manager; that in conformity with this policy, he determined whether lunch counters in the local McCrory's store would be segregated or not.

That on September 17th., 1960, there was a "sit-in" demonstration in the local store of McCrory's, involving one white man and some negroes; that he was in the store at the time.

At the conclusion of the testimony of this witness, the defendants offered in evidence, "House bills of the Louisiana Legislature of 1960, 343 through 366, which bills were all introduced by Representatives Fields, Lehrman

and Triche, and to be specific Numbers 343, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 360, 61, 62, 63, 64, 65, 66. All of which bills did not pass, but they are in the Journal. Also introduced and received in evidence were Acts 69, 73, 77, 78, 79, 70, 76, 81 and 68.

The motion to quash was submitted without argument.

A consideration of defendants' motion to quash, as well as the factual presentation on the hearing thereof, discloses defendants' position to be, that the enactment of L.S.A.-R.S. 14:59(6) by the Louisiana Legislature of 1960, was part of a "package deal", wherein and with specific purpose and intent, that body sought to implement and further the state's policy of enforced segregation of the races.

In addition, the same pleading and factual presentation, was offered by defendants' to support their contention, that L.S.A.-R.S. 14:59(6), was enforced against them arbitrarily, capriciously and discriminately in that it was being applied and administered unjustly and illegally, and only against persons of the negro race, and or white persons who acted in concert with members of the Negro race.

The courts have universally subscribed to the doctrine contained in the following citations:

#### **PRESUMPTIONS AND CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY**

"The constitutionality of every statute is presumed, and it is the duty of the court to uphold

a statute wherever possible and every consideration of public need and public policy upon which Legislature could rationally have based legislation should be weighed by the court, and, if statute is not clearly arbitrary, unreasonable and capricious it should be upheld as constitutional."

State vs. Rones, 67 So. 2d. 99, 223 La. 839.

Michon vs. La. State Board of Optometry  
Examiners, 121 So. 2d. 565.

"The constitutionality of a statute is presumed and the burden of proof is on the litigant, who asserts to the contrary, to point out with utmost clarity wherein the constitution of the state or nation has been offended by the terms of the statute attacked."

Olivedell Planting Co. v. Town of Lake  
Providence, 47 So. 2d. 23, 217 La. 621.

"Presumption is in favor of constitutionality of a statute, and statute will not be adjudged invalid unless its unconstitutionality is clear, complete and unmistakable."

State ex rel Porterie v. Grosjean, 161 So.  
871, 182 La. 298.

"The courts will not declare an act of the legislature unconstitutional unless it is shown that it clearly violates terms of articles of constitution."

Jones v. State Board of Ed. 53 So. 2d. 792,  
219 La. 630.

"A legislative act is presumed to be legal until it is shown that it is manifestly unconsti-

tutional, and all doubts as to the validity are resolved in favor its constitutionality."

"The rule that a legislative act is presumed to be legal until it is shown to be manifestly unconstitutional is strictly observed where legislature has enacted a law in exercise of its police powers."

Board of Barber Examiners of La. v. Parker, 182 So. 485, 190 La. 314.

"Where a statute is attacked for discrimination or unreasonable classification doubts are resolved in its favor and it is presumed that the Legislature acts from proper motives in classifying for legislative purposes, and its classification will not be disturbed unless it is manifestly arbitrary and invalid."

State vs. Winehall & Rosenthal, 86 So. 781, 147 La. 781, Writ of Error dismissed (1922). Winehalld & Rosenthal vs. State Louisiana, 42 S. Ct. 313, 258 U. S. 605, 66 L. Ed. 786.

"In testing validity of a statute the good faith on part of Legislature is always presumed."

State vs. Saia, 33 So. 2d. 665, 212 La. 868.

"There is strong presumption Legislature understands and appreciates needs of people, and that its discriminations are based on adequate grounds."

Festervand v. Laster, 130 So. 635, 15 La. App. 159.

"A statute involving governmental matters will be construed more liberally in favor of its con-

stitutionality than one affecting private interests."

State ex rel LaBauve, v. Mitchel, 46 So. 430, 121 La. 374.

"State is not presumed to act arbitrarily in exercising police power."

State ex rel Porterie, Atty. Gen. v. Walmsley, 162 So. 826, 183 La. 139, Appeal dismissed Board of Liquidation v. Board of Com'rs. of Port of New Orleans, 56 St. Ct. 141, 296 U. S. 540, 80 L. Ed. 384, rehearing denied Board of Liquidation, City Debt of New Orleans v. Board of Comrs. of Port of New Orleans, 56 S. Ct. 246, 296 U. S. 663, 80 L. Ed. 473.

"Where a law is enacted under exercise or pretended exercise of police power and appears upon its face to be reasonable, burden is upon party assailing such law to establish that its provisions are so arbitrarily and unreasonable as to bring it within prohibition of Fourteenth Amendment, U.S.C.A. Const. Amend. 14".

State vs. Saia, 33 So. 2d. 665, 212 La. 868.

"Act of Legislature is presumed to be legal, and the judiciary is without right to declare it unconstitutional unless that is manifest, and such rule is strictly observed in cases involving laws enacted in the exercise of the state's police power."

Schwegmann Bros. v. Louisiana Bd. of Alcohol Beverage Control, 43 So. 2d. 248, 216 La. 148, 14 A. L. R. 2d. 680.

**L. S. A. - R. S. 14:59 (6) UNDER WHICH THE PROSECUTION IS BASED AND THE BILL OF INFORMATION FOUNDED THEREON, ARE SO VAGUE, INDEFINITE AND UNCERTAIN AS NOT TO ESTABLISH AN ASCERTAINABLE STANDARD OF GUILT?**

Defendants' above stated complaint is without merit.

L.S.A.-R.S. 14:59 (6) under which defendants are charged reads as follows:

"Criminal mischief is the intentional performance of any of the following acts: \* \* \*

(6) "Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of said business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

The bill of information alleges:

"\* \* \* that on the 17th. of September, 1960, each did wilfully, unlawfully and intentionally take temporary possession of the lunch counter and restaurant of McCrory's Store, a corporation authorized to do business in the State of Louisiana, located at 1005 Canal Street, and did wilfully, unlawfully and intentionally remain in and at the lunch counter and restaurant in said place of business after Wendell Barrett the manager, a person in charge of said business, had ordered the said Sydney Langston Goldfinch, Jr., Rudolph Joseph

Lombard, Oretha Castle and Cecil Winston Carter, Jr., to leave the premises of said lunch counter and restaurant and to desist from the temporary possession of same, contrary, etc."

From the foregoing it will be seen that L.S.A.-R.S. 14:59 (6) as well as the bill of information filed thereunder, meet the constitutional rule governing the situation.

"When the meaning of a statute appears doubtful it is well recognized that we should seek the discovery of the legislative intent. *However, when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for construction.*"

State v. Marsh, et. al. 96 So. 2d. 643,  
233 La. 388.

State v. Arkansas Louisiana Gas Co., 78  
So. 2d. 825, 227 La. 179.

"Meaning of statute must be sought in the language employed, and if such language be plain it is the duty of courts to enforce the law as written."

State ex rel LeBlanc v. Democratic Central  
Committee, 86 So. 2d. 192, 229 La. 556.  
Texas Co. v. Cooper, 107 So. 2d. 676, 236  
La. 380.

Beta Xi Chapter, etc. v. City of N. O., 137  
So. 204, 18 La. App. 130.

Ramey v. Cudahy Packing Co., 200 So. 333.

"Statute, which describes indecent behaviour with juveniles as commission by anyone over 17,



of any lewd or lascivious act upon person or in presence of any child under age of 17, with intention of arousing or gratifying sexual desires of either person, which states that lack of knowledge of child's age shall not be a defense, and, which provides penalty therefor, sufficiently describes acts which constitute violation of statute and therefore, is constitutional. L. S. A. - R. S. 14:81"

State v. Milford, 73 So. 2d. 778, 225 La. 611.

State v. Saibold, 213 La. 415, 34 So. 2d. 909.

State v. Prejean, 216 La. 1072, 45 So. 2d. 627.

"The statute defining the crime of simple escape from 'lawful custody' of official of state penitentiary or from any 'place where lawfully detained' uses the quoted words in their common or ordinary meanings and is not violative of state or federal constitutions in failing to define the terms. L.S.A.-R.S. 14:110, L.S.A.-Const. Art. 1, Sec. 10; U.S.C.A.-Const. Amend. 14"

State v. Marsh, 96 So. 2d. 643, 233 La. 388.

L. S. A. - R. S. 15:227 provides:

"The indictment must state every fact and circumstance necessary to constitute the offense, but it need do no more, and it is immaterial whether the language of the statute creating the offense, or words unequivocally conveying the meaning of the statute is used."

"Information charging defendant violated a specific statute in that he entered without authority a described structure, the property of a named person, with the intent to commit a theft therein, set forth each and every element of the crime of simple burglary and fully informed accused of the nature and cause of the accusation, and therefore, was sufficient."

State v. McCrory, 112 So. 2d. 432, 237 La. 747.

"Where affidavit charged defendant with selling beer to minors under 18 years of age in the language of the statute, and set all the facts and circumstances surrounding the alleged offense, so that court was fully informed of the offense charged for the proper regulation of evidence sought to be introduced, and the accused was informed of the nature and cause of the accusation against her, and affidavit was sufficient to support a plea of former jeopardy, affidavit was sufficient to charge offense."

State v. Emmerson, 98 So. 2d. 225, 233 La. 885.

State v. Richardson, 56 So. 2d. 568, 220 La. 338.

L.S.A.-R.S. 14:59(6) upon which this prosecution is based is sufficient in its terms to notify all who may fall under its provisions as to what acts constitute a violation of the law, and the bill of information meets fully the requirements of the law.

THE BILL OF INFORMATION ON WHICH THE PROSECUTION IS BASED, DOES NOTHING MORE THAN SET FORTH A CONCLUSION OF LAW, AND DOES NOT STATE WITH CERTAINTY AND SUFFICIENT CLARITY THE NATURE OF THE ACCUSATION?

There is no merit to this contention.

As has been heretofore shown, the bill of information states "facts and circumstances" in compliance with the Constitutional mandate, L.S.A.-R.S. 15:227, and the decisions of the Supreme Court. The words used in describing the offense are those of L.S.A.-R.S. 14:59 (6), and are not conclusions of law by pleader.

"Information for taking excess amount of gas from well held not to state mere conclusions, where showing amount allowed and amount taken. Act No. 252, of 1924, sec. 4, subd. 2."

State v. Carson Carbon Co., 111 So. 162.  
162 La. 781.

L.S.A.-R.S. 14:59 (6) DEPRIVES DEFENDANTS OF EQUAL PROTECTION OF THE LAW IN THAT IT EXCLUDES FROM ITS PROVISIONS OF A CERTAIN CLASS OF CITIZENS, NAMELY THOSE WHO AT THE TIME ARE ACTIVE WITH OTHERS IN FURTHERANCE OF CERTAIN UNION (LABOR) ACTIVITIES?

The court is unable to relate this contention to the provisions of L.S.A.-R.S. 14:59 (6), or the bill of information filed thereunder.

No where in the statute is any reference made to labor union activities, nor does the statute make any exceptions or exclusions as to any persons or class of citizens, labor unions, or otherwise. It is probable that defendants have erroneously confused these proceedings with a charge under L.S.A.-R.S. 14:103 (Disturbance of the Peace.)

THE DEFENDANTS ARE BEING DEPRIVED OF THEIR RIGHTS UNDER THE "EQUAL PROTECTION AND DUE PROCESS" CLAUSES OF BOTH THE CONSTITUTION OF LOUISIANA AND OF THE UNITED STATES OF AMERICA, IN THAT THE SAID LAW UNDER WHICH THE BILL OF INFORMATION IS FOUNDED IS BEING ENFORCED AGAINST THEM ARBITRARILY, CAPRICIOUSLY AND DISCRIMINATELY, IN THAT IT IS BEING APPLIED AND ADMINISTERED UNJUSTLY AND ILLEGALLY, AND ONLY AGAINST PERSONS OF THE NEGRO RACE AND/OR WHITE PERSONS WHO ACT IN CONCERT WITH MEMBERS OF THE NEGRO RACE?

The prosecution of defendants is in the name of the State of Louisiana, through the District Attorney for the Parish of Orleans. This officer is vested with absolute discretion as is provided by L.S.A.-R.S. 15:17.

It reads as follows:

"The district attorney shall have entire charge and control of every criminal prosecution instituted or pending in any parish wherein he is district attorney, and shall determine whom, when, and how he shall prosecute, etc."

In the case of *State v. Jourdain*, 74 So. 2d. 203, 225 La. 1030; it was claimed in a motion to quash that the narcotic law was being administered by the New Orleans Police Department and the District Attorney's Office in a manner calculated to deprive the defendant of the equal protection of the law, and in violation of Section 1 of the 14th. Amendment of the Constitution of the United States, in that these officials were actively prosecuting the infraction in this case, whereas they refrained from prosecuting other violations of the narcotic act of a more serious nature.

In sustaining the trial court's ruling, Your Honors said:

"The claim is untenable. Seemingly, it is the thought of counsel that the failure of the Police Department and the District Attorney to offer appellant immunity, if he would become an informer, operates as a purposeful discrimination against him and thus denies him an equal protection of the law. But, if we conceded that the police and the district attorney have failed to prosecute law violators who have agreed to become informers, this does not either constitute an unlawful administration of the statute or evidence as intentional or purposeful discrimination against appellant. The matter of the prosecution of any criminal case is within the entire control of the district attorney (R.S. 15:17) and the fact that not every violator has been prosecuted is of no concern of appellant, in the absence of an allegation that he is a mem-

ber of a class being prosecuted solely because of race, religion, color or the like, or that he alone is the only person who has been prosecuted under the statute. Without such charges his claim cannot come within that class of unconstitutional discrimination which was found to exist in *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 and *McFarland v. American Sugar Ref. Co.*, 241 U. S. 79, 60 L. Ed. 899, 36 S. Ct. 498. See *Snowden v. Hughes*, 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397, and cases there cited."

In the case of *City of New Orleans versus Dan Levy, et. al.*, 233 La. 844, 98 So. 2d. 210, Justice McCaleb in concurring stated:

"I cannot agree that the City of New Orleans and the Vieux Carre Commission are or have been applying the ordinances involved with "an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances" (see *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 1073, 30 L. Ed. 220) and have thus denied to appellant an equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution."

The sum and substance of appellant's charges is that his constitutional rights have been violated since many other similar or more severe violations of the city ordinances exist and that the city officials have permitted such violations by not taking any action to enforce the law. These

complaints, even if established, would not be sufficient in my opinion to constitute an unconstitutional denial of equal protection to appellant as it is the well-settled rule of the Supreme Court of the United States and all other state courts of last resort that the constitutional prohibition embodied in the equal protection clause applies only to discriminations which are shown to be of an intentional, purposeful ~~or~~ systematic nature. *Snowden v. Hughes*, 321 U. S. 1, 9, 64 S. Ct. 397, 88 L. Ed. 497, 503; *Charleston Federal Savings & Loan Ass'n. v. Alderson*, 324 U. S. 182, 65 S. Ct. 624, 89 L. Ed. 857; *City of Omaha v. Lewis & Smith Drug Co.*, 156 Neb. 650, 57 N. W. 2d. 269; *Zorach v. Clauson*, 303 N. Y. 161, 100 N. E. 2d. 463; 12 Am Jur. Section 566 and *State v. Anderson*, 206 La. 986, 20 So. 2d. 288.

In *State v. Anderson*, this court quoted at length from the leading case of *Snowden v. Hughes*, supra, (321 U. S. 1, 9, 64 S. Ct. 401) where the Supreme Court of the United States expressed at some length the criteria to be used in determining whether an ordinance or statute, which is claimed to have been unequally administered, transgresses constitutional rights. The Supreme Court said:

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with



respect to a particular class or person, of *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 86, 87, 36 S. Ct. 498, 501, 60 L. Ed. 899 (1904), or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, *Yick Wo v. Hopkins*, 118 U. S. 356, 373, 374, 6 S. Ct. 1064, 1072, 1073, 30 L. Ed. 220 (1227, 228). But a discriminatory purpose is not presumed. *Tarrance v. State of Florida*, 188 U. S. 519, 520, 23 St. Ct. 402, 403, 47 L. Ed. 572 (573); there must be a showing of 'clear and intentional discrimination', *Gundling v. City of Chicago*, 177 U. S. 183, 186, 20 S. Ct. 633, 635, 44 L. Ed. 725 (728); see *Ah Sin v. Wittman*, 198 U. S. 500, 507, 508, 25 S. Ct. 756, 758, 759, 49 L. Ed. 1142 (1145, 1146); *Bailey v. State of Alabama*, 219 U. S. 219, 231, 31 S. Ct. 145, 147, 55 L. Ed. 191 (197). Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. *Neal v. State of Delaware*, 103 U. S. 370, 394, 397, 26 L. Ed. 567 (573, 574); *Norris v. State of Alabama*, 294 U. S. 587, 589, 55 S. Ct. 579, 580, 79 L. Ed. 1074 (1076); *Pierre v. State of Louisiana*, 306 U. S. 354, 357, 59 S. Ct. 536, 538, 83 L. Ed. 757, (759); *Smith v. State of Texas*, 311 U. S. 128, 130, 131, 61 S. Ct. 164, 165, 85 L. Ed. 84 (86, 87); *Hill v. State of Texas*, 316 U. S. 400, 404, 62 S. Ct. 1159, 1161, 86 L. Ed. 1559 (1562). But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing

of actual discrimination because of race. *State of Va. v. Rives*, 100 U. S. 313, 322, 323, 25 L. Ed. 667, (670, 671) *Martin v. State of Texas*, 200 U. S. 316, 320, 321, 26 S. Ct. 338, 339, 50 L. Ed. 497 (499); *Thomas v. State of Texas*, 212 U. S. 278, 282, 29 S. Ct. 393, 394, 53 L. Ed. 512 (514); cf. *Williams v. State of Mississippi*, 170 U. S. 213, 225, 18 S. Ct. 583, 588, 42 L. Ed. 1012 (1016).

"Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by assessment laws. It is not enough to establish a denial of equal protection, that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination which may be evidenced, for example, by a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of the law is the same as though the discrimination were incorporated in and proclaimed by the statute. *Coulter v. Louisville & N. R. Co.*, 196 U. S. 599, 608, 609, 610, 25 St. Ct. 342, 343, 344, 345, 49 L. Ed. 615 (617, 618); *Chicago B & Q R Co., v. Babcock*, 204 U. S. 585, 597, 27 St. Ct. 326, 328, 51 L. Ed. 636 (640); *Sunday Lake Iron Co. v. Wakefield Twp.* 247 U. S. 350, 353, 38 St. Ct. 495, 62 L. Ed. 1154 (1156); *Southern R. Co. v. Watts*, 260 U. S. 519, 526, 43 S. Ct. 192, 195, 67 L. Ed. 375 (387). Such discrimination may also be shown to be purposeful, and hence a denial of equal protection, even though it is

neither systematic nor long continued. Cf. *McFarland v. American Sugar Refining Co.* (241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 899) *supra*.

"The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the approbrious epithets 'willful' and 'malicious' . . . ."

On rehearing in the *Levy Case*, Mr. Justice Simon, speaking for the Court said:

"In the instant case there is no proof that in the enforcement of the municipal zoning and Vieux Carre ordinances that the City acted with a deliberate discriminatory design, intentionally favoring one individual or class over another. It is well accepted that a discriminatory purpose is never presumed and that the enforcement of the laws by public authorities vested, as they are with a measure of discretion will, as a rule, be upheld."

Applying the cases herein cited, to the proof adduced by defendants in support of their claim of unjust, illegal, and discriminatory administration of L.S.A.-R.S. 14:59 (6), defendants have failed to sustain their burden.

The claim is without merit.

**L.S.A.-R.S. 14:59 (6) UNDER WHICH THE DEFENDANTS ARE CHARGED IS UNCONSTITUTIONAL AND IN CONTRAVENTION OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED**

STATES, AND IN CONTRAVENTION OF THE CONSTITUTION OF LOUISIANA, IN THAT IT WAS ENACTED FOR THE SPECIFIC PURPOSE AND INTENT TO IMPLEMENT AND FURTHER THE STATE'S POLICY OF ENFORCED SEGREGATION OF RACES?

This contention of defendants is without merit.

Certainly under its police power the legislature of the state was within its rights to enact L.S.A.-R.S. 14:59(6).

What motives may have prompted the enactment of the statute is of no concern of the courts. As long as the legislature complied with the constitutional mandate concerning legislative powers and authority, this was all that was required.

"It has been uniformly held that every reasonable doubt should be resolved in favor of the constitutionality of legislative acts. We said in *State ex rel. Knox v. Board of Supervisors of Grenada County*, 141 Miss. 701, 105 So. 541, in a case involving Section 175 of the Mississippi Constitution, that if systems (acts) of the kind here involved are evil, or if they destroy local government in the counties and municipalities, that is a question to be settled at the ballot boxes between the people and the Legislature. And whether the law is needed or not, or whether it is wise or not, cannot be settled here. Our functions are to decide whether the Legislature had the power to act in

passing the law and not whether it ought to have acted in the manner it did. The court will uphold the constitution in the fullness of its protection, but it will not and cannot rightfully control the discretion of the Legislature within the field assigned to it by the Constitution."

State of Mississippi ex rel. Joe T. Patterson, Attorney General v. Board of Supervisors of Prentiss County, Miss. 105 So. 2d. 154, (Mississippi)

"The state, in the brief of its counsel, argues: 'If we assume that R. S. 56:131 et sequor must be followed — then there can be no enforcement of the fish and game laws by the criminal courts. Only a \$25 penalty can be inflicted against a person who is apprehended for wilfully killing a doe deer. Certainly this small 'civil' penalty will not deter willful game violators and our deer population will soon be decimated. \* \* \* Whether the prescribed civil proceeding with its attendant penalty militates against adequate wild life protection is not for the courts' determination. The question is one of policy which the lawmakers must resolve."

State v. Coston, 232 La. 1019, 95 So. 2d. 641.

"We should also retain in our thinking the proposition that the regulation and control of the alcoholic beverage business is peculiarly a legislative function. In this connection, as in all similar situations, when the legislative branch of the government exercises a legislative power in the form of

a duly enacted statute or ordinance it is not the function of a court to explore the wisdom or advisability of the enactment in order to bring its enforcement into question. To this end the limits of the court's authority is to measure the validity of the legislative enactment by the requirements of the controlling law. If those standards are met the legislation should be upheld. *Somlyo v. Schott, supra.*"

*State v. Cochran*, 114 So. 2d. 797 (Fla.)

"In *Morgan County v. Edmonson*, 238 Ala. 522, 192 So. 274, 276, we said:

'It is of course a well settled rule that in determining the validity of an enactment, the judiciary will not inquire into the motives or reasons of the Legislature or the members thereof. 16 C.J.S., Constitutional Law, pp. 154, p. 487. 'The judicial department cannot control legislative discretion, nor inquire into the motives of legislators.' *City of Birmingham v. Henry*, 224 Ala. 239, 139 So. 283. See also, *State ex rel. Russum v. Jefferson County Commission*, 224 Ala. 229, 139 So. 243; \*\*\*\*\*'

It is our solemn duty to uphold a law which has received the sanction of the Legislature, unless we are convinced beyond a reasonable doubt of its unconstitutionality. *Yielding v. State ex rel. Wilkinson*, 232 Ala. 292, 167 So. 580."

*State v. Hester*, 72 So. 2d. 61 (Ala.)

"Another factor which fortifies our view is this: the act assaulted is a species of social legis-

lation, that is, a field in which the legislative power is supreme unless some specific provision of organic law is transgressed. Absent such transgression it is for the legislature and not the courts to determine what is "unnecessary, unreasonable, arbitrary and capricious". Requiring hotels, motels, and other rooming houses to advertise full details of room charges if they exercise that medium is certainly a legislative prerogative with which the courts have no power to interfere. A legislative finding that such a requirement is in the public interest concludes the matter."

Adams v. Miami Beach Hotel Association,  
77 So. 2d. 465, (Fla.)

"Statute is not unconstitutional merely because it offers an opportunity for abuses."

James v. Todd (Ala) 103 So. 2d. 19. Appeal dismissed 79 S. Ct. 288, 358 U.S. 206, 3 L. Ed. 2d. 235.

"Validity of law must be determined by its terms and provisions, not manner in which it might be administered, operated or enforced."

Clark v. State (Miss) 152 So. 820.

"The state legislature is unrestricted, save by the state or federal constitution, and a statute passed by it, in the exercise of the powers, the language of which is plain, must be enforced, regardless of the evil to which it may lead."

State v. Henry (Miss) 40 So. 152, 5 L.R.A. N. S. 340.

"If the power exists in the legislative department to pass an act, the act must be upheld



by the court, even though there may be a possibility of administration abuse."

Stewart v. Mack (Fla.) 66 So. 2d. 811.

"The gravamen of the offense denounced by section 3403 is the entry by one upon the enclosed land or premises of another occupied by the owner or his employees after having been forbidden to enter, or not having been previously forbidden refusing to depart therefrom after warned to do so."

. . . . .

"It is contended that the statute is invalid because it is apparent that its terms are for the protection of the lessor in the enjoyment of his property. Conceding that to be true, we find no reason for the deduction that the statute is therefore invalid. All statutes against trespass are primarily for the protection of the individual property owner, but they are also for the purpose of protecting society against breaches of the peace which might occur if the owner of the property is required to protect his rights by force of arms."

Coleman, Sheriff v. State ex rel Carver  
(Fla.) 161 So. 89.

**L.S.A.-R.S. 14:59(6) EXCEEDS THE POLICE POWER OF THE STATE, IN THAT IT HAS NO REAL, SUBSTANTIAL OR RATIONAL RELATION TO THE PUBLIC SAFETY, HEALTH, MORALS, OR GENERAL WELFARE, BUT HAS FOR ITS PURPOSE AND OBJECT, GOVERNMENTALLY SPONSORED AND ENFORCED SEPARATION OF RACES, THUS DENYING**

DEFENDANTS THEIR RIGHTS UNDER THE FIRST, THIRTEENTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTION 2 OF THE LOUISIANA CONSTITUTION?

THE REFUSAL TO GIVE SERVICE SOLELY BECAUSE OF RACE THE ARREST AND SUBSEQUENT CHARGE ARE ALL UNCONSTITUTIONAL ACTS IN VIOLATION OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION, IN THAT THE ACT OF THE COMPANY'S REPRESENTATIVE WAS NOT THE FREE WILL ACT OF A PRIVATE INDIVIDUAL, BUT RATHER AN ACT WHICH WAS ENCOURAGED, FOSTERED AND PROMOTED BY STATE AUTHORITY IN SUPPORT OF A CUSTOM AND POLICY OF ENFORCED SEGREGATION OF RACE AT LUNCH COUNTERS?

THE ARREST, CHARGE AND PROSECUTION OF THE DEFENDANTS ARE UNCONSTITUTIONAL. IN THAT IT IS THE RESULT OF STATE AND MUNICIPAL ACTION, THE PRACTICAL EFFECT OF WHICH IS TO ENCOURAGE AND FOSTER DISCRIMINATION BY PRIVATE PARTIES?

The Court has grouped together for discussion the propositions hereinabove enumerated as they appear to be related to each other in the sum total of defendants complaint of the unconstitutionality of L.S.A.-R.S. 14:59(6).

There is presently no anti-discrimination statute in Louisiana. Sections 3 and 4 of Title 4 of the Revised

Statutes having been repealed by Act 194 of 1954. Nor is there any legislation compelling the segregation of the races in restaurants, or places where food is served.

As authority supporting the constitutionality of L.S.A.-R.S. 14:59(6), the following cases are cited:

In the case of State v. Clyburn, et al., (N.C.) 1958, 101 S. E. 2d. 295, the defendants, a group of Negroes led by a minister, entered a Durham, North Carolina, ice cream and sandwich shop which was separated by a partition into two parts marked "White" and "Colored". They proceeded to the portion set apart for white patrons and asked to be served. Service was refused and the proprietor asked them to leave, or to move to the section marked "Colored." The minister asserted religious and constitutional bases for remaining. A city police officer placed them under arrest. The defendants were tried and convicted on warrants charging violation of state statutes which impose criminal penalties upon persons interfering with the possession of privately-held property. On appeal the Supreme Court of North Carolina affirmed the conviction. Finding no "state action" within the prohibition of the Fourteenth Amendment, the Court held that the Constitutional rights of defendants had not been infringed by refusing them service or by their subsequent arrest.

In resolving the question, "Must a property owner engaged in a private enterprise submit to the use of his property to others simply because they are members of a different race," the Supreme Court of North Carolina said:

"The evidence shows the partitioning of the building and provision for serving members of the different races in differing portions of the building was the act of the owners of the building, operators of the establishment. Defendants claim that the separation by color for service is a violation of their rights guaranteed by the Fourteenth Amendment to the Constitution of the United States."

\* \* \* \* \*

"Our statutes, G. S. Para. 14-126 and 134, impose criminal penalties for interfering with the possession or right of possession of real estate privately held. These statutes place no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The possessor may accept or reject whomsoever he pleases and for whatsoever whim suits his fancy. When that possession is wrongfully disturbed it is a misdemeanor. The extent of punishment is dependent upon the character of the possession, actual or constructive, and the manner in which the trespass is committed. Race confers no prerogative on the intruder; nor does it impair his defense.

The Fourteenth Amendment to the Constitution of the United States created no new privileges. It merely prohibited the abridgment of existing privileges by state action and secured to all citizens the equal protection of the laws.

Speaking with respect to rights then asserted, comparable to rights presently claimed, Mr. Justice Bradley, in the Civil Rights Cases, 109

U. S. 3, 3 S.Ct. 18, 21, 27 L. Ed. 835, after quoting the first section of the Fourteenth Amendment, said: 'It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere brutum fulmen the last section of the amendment invests congress with power to enforce it by appropriate legislation. -To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are

undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect.'

In *United States v. Harris*, 106 U. S. 629, 1 S. Ct. 601, 609, 27 L. Ed. 290, the Court, quoting from *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588 said: 'The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there. The only obligation resting upon the United States is to see that the states do not deny the right. The power of the national government is limited to this guaranty.'

More than half a century after these cases were decided the Supreme Court of the United States said in *Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A.L.R. 2d. 441: 'Since

the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. This interpretation has not been modified: *Collins v. Hardyman*, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253; *District of Columbia v. Thompson Co.*, 346 U. S. 100, 73 S. Ct. 1007, 97 L. Ed. 1480; *Williams v. Yellow Cab Co.*, 3 Cir. 200 F. 2d 302, certiorari denied *Dargan v. Yellow Cab Co.*, 346 U. S. 840, 74 S. Ct. 52, 98 L. Ed. 361.

*Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133, presented the right of a corporation, organized under the New York law to provide low cost housing, to select its tenants, with the right to reject on account of race, color, or religion. The New York Court of Appeals affirmed the right of the corporation to select its tenants. The Supreme Court of the United States denied certiorari, 339 U. S. 981, 70 S. Ct. 1019, 94 L. Ed. 1385.

The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation. *Madden v. Queens County Jockey Club*, 269 N. Y. 249, 72 N. E. 2d 697, 1 A. L. R. 2d 1160; *Terrell Wells Swimming Pool*



v. Rodriguez Tex. Civ. App. 182 S. W. 2d. 824; Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N. W. 589, 24 L. R. A., N. S. 447; Younger v. Judah, 111 Mo. 303, 19 S. W. 1109; Goff v. Savage, 122 Wash. 194, 210 P. 374, De La Ysla v. Publix Theatres Corporation, 82 Utah 598, 26 P. 2d. 818; Brown v. Meyer Sanitary Milk Co., 150 Kan. 931, 96 P. 2d. 651;

Horn v. Illinois Cent. R. Co., 327 Ill. App. 498, 64 N. E. 2d. 574; Coleman v. Middlestaff, 147 Cal. App. 2d. Supp. 833, 305 P. 2d. 1020; Fletcher v. Coney Island, 100 Ohio App. 259, 136 N. E. 2d. 344; Alpaugh v. Wolverton, 184 Va. 943, 36 S. E. 2d. 906. The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants.

The fact that the proprietors of the ice cream parlor contributed to the support of local government and paid a license or privilege tax which license contained no restrictions as to whom the proprietors could serve cannot be construed to justify a trespass, nor is there merit in the suggestion that the complaint on which the warrant of arrest issued, signed by an officer charged with the duty of enforcing the laws, rather than by the injured party, constituted state action denying privileges guaranteed to the defendants by the Fourteenth Amendment. The crime charged was committed in the presence of the officer and after a respectful request to desist. He had a right to arrest. G. S. Par. 15-41.

*Screws v. United States*, 325 U. S. 91, 65 S. Ct. 1031, 85 L. Ed. 1368; and *State v. Scoggin*, 236 N. C. 19, 72 S. E. 2d. 54, cited and relied upon by defendants, appellants, to support their position, have no factual analogy to this case. Nothing said in those cases in any way supports the position taken by defendants in this case."

In the case of *Browning v. Slenderella Systems of Seattle*, (Wash) (1959), 341 P. 2d. 859, two justices of the Supreme Court of Washington dissented in a ruling of that court holding a reducing salon came within the purview of an Anti-Discrimination Statute of that State.

In their dissent it was said:

"Because respondent is a Negress, the Slenderella Systems of Seattle, a private enterprise, courteously refused to give her a free reducing treatment, as advertised. She thereupon became abusive and brought this civil action for the injury to her feelings caused by the racial discrimination.

This is the first such action in this state. In allowing respondent to maintain her action, the majority opinion has stricken down the constitutional right of all *private* individuals of every race to choose with whom they will deal and associate in their *private* affairs.

No sanction for this result can be found in the recent segregation cases in the United States supreme court involving Negro rights in public schools and public busses. These decisions were predicated upon section 1 of the fourteenth amend-

ment to the United States constitution, which reads:

'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the *privileges* or *immunities* of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal* protection of the laws.' (Italics mine.)

In the pre-Warren era, the courts had held that the privileges of Negroes under the fourteenth amendment, *supra*, were not *abridged* if they had available to them public services and facilities of *equal quality* to those enjoyed by white people. The Warren antisegregation rule abandoned that standard and substituted the unsegregated enjoyment of public services and facilities as the sole test of Negro equality before the law in such public institutions.

The *rights* and *privileges* of the fourteenth amendment, *supra*, as treated in the segregation decisions and as understood by everybody, related to *public institutions* and *public utilities* for the obvious reason that no person, whether white, black, red, or yellow, has any right whatever to compel another to do business with him in his *private* affairs.

No public institution or public utility is involved in the instant case. The Slenderella enterprise was not established by law to serve a public purpose. It is not a *public* utility with monopoly prerogatives granted to it by franchise in exchange for an unqualified obligation to serve everyone alike. Its employees are not public servants or officers. It deals in *private personal services*. Its business, like most service trades, is conducted pursuant to informal contracts. The fee is the consideration for the service. It is true the contracts are neither signed, sealed, nor reduced to writing. They are contracts, nevertheless, and, as such, must be voluntarily made and are then, and only then, mutually enforceable. Since either party can refuse to contract, the respondent had no more right to compel service than Slenderella had to compel her to patronize its business.

There is a clear distinction between the non-discrimination enjoined upon a public employee in the discharge of his official duties, which are prescribed by laws applicable to all, and his unlimited freedom of action in his private affairs. There is no analogy between a public housing project operated in the government's proprietary capacity, wherein Negroes have equal rights, and a private home where there are no public rights whatever and into which even the King cannot enter.

No one is obliged to rent a room in one's home; but, if one chooses to operate a boarding house therein, it can be done with a clientele selected according to the taste or even the whim of

the landlord. This right of discrimination in private businesses is a constitutional one.

"The ninth amendment of the United States constitution specifically provides:

'The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.'

All persons familiar with the rights of English speaking peoples know that their liberty inheres in the scope of the individual's right to make uncoerced choices as to what he will think and say; to what religion he will adhere; what occupation he will choose; where, when, how and for whom he will work, and generally to be free to make his own decisions and chooses his course of action in his private civil affairs. These constitutional rights of law-abiding citizens are the every essence of American liberties. For instance, they far outweigh in importance the fifth amendment to the United States constitution which excuses criminals from giving evidence against themselves. It was, in fact, an afterthought. Our constitutional forefathers were chiefly concerned with the rights of honest men. They would have specified their rights with the same particularity that they did in regard to criminals if they had foreseen that courts would become unfamiliar with them.

Cash registers ring for a Negro's as well as for a white man's money. Practically all American businesses, excepting a few having social overtones or involving personal services, actively seek

Negro patronage for that reason. The few that do not serve Negroes adopt that policy either because their clientele insist upon exclusiveness, or because of the reluctance of employees to render intimate personal service to Negroes. Both the clientele and the business operator have a constitutional right to discriminate in their private affairs upon any conceivable basis. The right to exclusiveness, like the right to privacy, is essential to freedom. No one is legally aggrieved by its exercise.

No sanction for destroying our most precious heritage can be found in the *criminal* statute cited by the majority opinion. It does not purport to create a civil cause of action. The statute refers to "places of *public* resort". (Italics mine). This phrase is without constitutional or legal significance. It has no magic to convert a *private* business into a governmental institution. If one man a week comes to a tailor shop, it is a place of *public* resort, but that does not make it a public utility or public institution, and the tailor still has the right to select his private clientele if he chooses to do so. As a matter of fact, the statute in question is not even valid as a criminal statute. Obviously, this is not the occasion, however, to demonstrate its unconstitutionality.

The majority opinion violates the thirteenth amendment to the United States constitution. It provides, *inter alia*:

**"Neither slavery nor involuntary servitude . . . shall exist within the United States . . ." (Italics mine)**

—Negroes should be familiar with this amendment. Since its passage, they have not been compelled to serve any man against their will. When a white woman is compelled against her will to give a Negress a Swedish massage, that too is involuntary servitude. *Henderson v. Coleman*, 150 Fla. 185, 7 So. 2d. 177.

Through what an arc the pendulum of Negro rights has swung since the extreme position of the *Dred Scott* decision: Those rights reached dead center when the thirteenth amendment to the United States constitution abolished the ancient wrong of Negro slavery. This court has now swung to the opposite extreme in its opinion subjecting white people to "involuntary servitude" to Negroes. I dissent."

In the case of *Williams versus Howard Johnson's Restaurant*, (Va.) (1959), U. S. C. A. 4th. Cir., F. 2d. 845, a Negro attorney brought a class action in federal court against a restaurant located in Alexandria, Virginia seeking a declaratory judgment that a refusal to serve him because of race, violated, the Civil Rights Act of 1875, etc.

On appeal, the Court of Appeals for the Fourth Circuit affirmed the lower court's dismissal for want of jurisdiction and failure to state a cause of action, on the ground that defendant's restaurant, could refuse service to anyone, not being a facility of interstate commerce,



and that the Civil Rights Act of 1875, did not embrace actions of individuals. Further, that as an instrument of local commerce, it was at liberty to deal with such persons as it might select.

The court said:

"Section 1 and 2 of the Civil Rights Act of 1875, upon which the plaintiff's position is based in part, provided that all persons in the United States should be entitled to the full and equal enjoyment of accommodations, advantages, facilities and privileges of inns, public conveyances and places of amusement, and that any person who should violate this provision by denying to any citizen the full enjoyment of any of the enumerated accommodations, facilities or privileges should for every such offense forfeit and pay the sum of \$500 to the person aggrieved. The Supreme Court of the United States, however, held in *Civil Rights Cases*, 109 U. S. 3, that these sections of the Act were unconstitutional and were not authorized by either the Thirteenth or Fourteenth Amendments of the Constitution. The court pointed out that the Fourteenth Amendment was prohibitory upon the states only, so as to invalidate all state statutes which abridge the privileges or immunities of citizens of the United States or deprive them of life, liberty or property without due process of law, or deny to any person the equal protection of the laws; but that the amendment did not invest Congress with power to legislate upon the actions of individuals, which are within the domain of state

legislation. The Court also held that the question whether Congress might pass such a law in the exercise of its power to regulate commerce was not before it, as the provisions of the statute were not conceived in any such view (109 U. S. 19). With respect to the Thirteenth Amendment, the Court held that the denial of equal accommodations in inns, public conveyances and places of amusement does not impose the badge of slavery or servitude upon the individual but, at most infringes rights protected by the Fourteenth Amendment from state aggression. It is obvious, in view of that decision, that the present suit cannot be sustained by reference to the Civil Rights Act of 1875.

The plaintiff concedes that no statute of Virginia requires the exclusion of Negroes from public restaurants and hence it would seem that he does not rely upon the provisions of the Fourteenth Amendment which prohibits the states from making or enforcing any law abridging the privileges and immunities of citizens of the United States or denying to any person the equal protection of the law. He points, however, to statutes of the state which requires the segregation of races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage; he emphasizes the long established local custom of excluding Negroes from public restaurants and he contends that the acquiescence of the state in these practices amounts to discriminatory state action which falls within the condemnation of the Constitution. The essence of the argument is that the

state licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.

This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices. Unless these actions are performed in obedience to some positive provision of state law they do not furnish a basis for the pending complaint. The license laws of Virginia do not fill the void. Section 35-26 of the Code of Virginia, 1950, makes it unlawful for any person to operate a restaurant in the state without an unrevoked permit from the Commissioner, who is the chief executive officer of the State Board of Health. The statute is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served. The customs of the people of the state do not constitute state action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in *Shelley v. Kraemer*, 334 U. S. 1; 68 S. Ct. 836, 842:

'Since the decision of this court in the "Civil Rights Cases, 1883, 109 U. S. 3 \* \* \* the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is *only*

*such action as may fairly be said to be that of the states. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. (Emphasis supplied.)"*

In the case of State of Maryland versus Drews, Et. Als., Cir. Court for Baltimore Co. (May 6, 1960). (Race Relations Law Reporter, Vol. 5, No. 2, Summer—1960) five persons, three white and two Negro, were prosecuted in the Baltimore County, Maryland Circuit Court on the statutory charge of disturbing the peace. It was found that defendants had on the date of their arrest entered an amusement park owned by a private corporation, which unknown to defendants, had a policy of not serving colored persons. A special officer employed by the corporate owners informed defendants of the policy and asked the two colored defendants to leave. When they refused, all five defendants were requested to leave, but all refused. Baltimore County police who were then summoned to the area repeated the requests; but defendants again refused to leave; that over the physical resistance of defendants, they were arrested and removed from the premises.

The Court held: (1) that the park owner, though corporately chartered by the state and soliciting public patronage, could 'arbitrarily restrict (the park's) use to invitees of his selection' etc. \* \* \* (3) that such action occurred in a 'place of public resort or amusement' within terms of the statute allegedly violated, the quoted phrase clearly applying to all places where some segment of the public habitually gathers, and not merely to publicly

owned places where all members of the public without exception are permitted to congregate.

The Court said:

"The first question which arises in the case is the question whether an owner of private property to which substantial numbers of persons are invited has any right to discriminate with respect to persons invited thereon, that is to say, whether such owner may exercise his own arbitrary freedom of selection in determining who will be admitted to and who will be permitted to remain upon his property under circumstances where such private property is being used as a place of resort or amusement. This question has been clearly answered in the affirmative by the authorities. In *Madden v. Queens County Jockey Club*, 72 N. E. 2d. 697 (Court of Appeals of New York), it was said at Page 698:

'At common law a person engaged in a public calling such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. \* \* \* On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. \* \* \* \*'

'The common-law power of exclusion, noted above, continues until changed by legislative enactment.'

The ruling therein announced was precisely adopted in the case of *Greenfield v. Maryland Jockey Club*, 190 Md. 96, the Court of Appeals, stating at Page 102 of its opinion that:

'The rule that, except in cases of common carriers, innkeepers and similar public callings, one may choose his customers is not archaic.'

The Court of Appeals also carefully pointed out in the *Greenfield* case that the rule of the common law is not altered even in the case of a corporation licensed by the State of Maryland. The doctrine of the *Madden* and *Greenfield* cases, *supra*, announced as existing under the common law, has been held valid, even where the discrimination was because of race or color. See *Williams v. Howard Johnson Restaurant*, 268 F. 2d. 845 (restaurant) (CCA 4th); *Slack v. Atlantic White Tower Systems, Inc.*, No. 11073 U.S.D.C. for the District of Maryland, D. R. et. al. Thomsen, J. (restaurant); *Hackley v. Art Builders, Inc. et al* (U.S.D.C.) for the District of Maryland, D. R. January 16, 1960 (real estate development).

The right of an owner of property arbitrarily to restrict its use to invitees of his selection is the established law of Maryland. Changes in the rule of law conferring that right are for the legislative and not the judicial branch of government.

We pass then to the second question: Did such action occur at a place of public resort or amusement? This involves a determination of the legislative meaning of the expression "place of

public resort or amusement". If the legislative intent was that the words were intended to apply only to publicly owned places of resort or amusement, then, manifestly, the testimony would not support a conviction here. By the same token, if the expression was intended to apply only to places in which all members of the public without exception were authorized or permitted to congregate, again there would be no evidence to support conviction here. On the other hand, if the reasonable intent and purpose of the quoted phrase was to prohibit disorderly conduct in a place where some segment of the public habitually gathers and congregates, the evidence would clearly justify a conviction.

The first suggested interpretation of the words must be rejected, because of the fact that the same statute uses the term 'public worship', and this fact utterly destroys a contention that the word 'public' has a connotation of public ownership because of our constitutional separation of church and state.

The second suggested interpretation is equally invalid, because its effect, in the light of the rule of law announced in the Greenfield case, supra, would be the precise equivalent of the first suggested interpretation of the phrase. Moreover, such an interpretation necessarily would mean that the police authorities would be powerless to prevent disorder or bring an end to conditions of unrest and potential disturbance where large numbers of the public may be in congregation. To suggest such an interpretation is to refute it.



In the opinion of this Court the statute has clear application to any privately owned place, where crowds of people other than the owner of the premises habitually gather and congregate, and where, in the interest of public safety, police authorities lawfully may exercise their function of preventing disorder. See *Askew v. Parker*, 312 P. 2d. 342 (California). See also *State v. Lanouette*, 216 N.W. 870 (South Dakota).

It is the conclusion of the Court that the Defendants are guilty of the misdemeanor charged."

In the case of *Henry v. Greenville Airport Com.*, U. S. Dist. Court (1959) 175 F. Supp. 343, an action asserting federal jurisdiction on the basis of diversity of citizenship, general federal question, and as a class action under federal civil rights statutes was brought in a federal district court by a Negro against the Greenville, S. C., airport commission, members thereof, and the airport manager. The complaint alleged that the manager even though informed that plaintiff was an interstate traveler, ordered him to use a racially segregated waiting room. Plaintiff's motion for a preliminary injunction to restrain defendant from making distinctions based on color relative to services at the airport was denied in addition to other reasons, because it was not alleged that defendants had denied him any right under color of state law. The allegation that defendants received contributions from 'the Government' to construct and maintain portions of the airport was also stricken because it was also held to have nothing to do with the claim that he had been deprived of a civil right

under state law. Defendant's motion to dismiss was granted because plaintiff not having alleged that any thing complained of was done under color of a specified state law, failed to state a cause of action under Section 1343 of Title 28 and it being inferable from the complaint that he went into the waiting room in order to instigate legislation rather than in quest of waiting room facilities, he had no cause of action under Section 1981 of Title 42 which was said to place duties on Negroes equal to those imposed on white persons and to confer no rights on Negroes superior to those accorded white persons. It was emphasized that activities which are required by the state, must be distinguished from those carried out by voluntary choice by individuals in accordance with their own desires and social practices, the latter kind not being state action.

The court said:

The plaintiff speaks of discrimination without unequivocally stating any fact warranting an inference of discrimination. The nearest thing to an unequivocal statement in his affidavit is the asserted fact that the purported manager of the Greenville Air Terminal "advised him that "we have a waiting room for colored folks over there". Preceding that statement plaintiff's affidavit contains the bald assertion that the manager "ordered me out". However, the only words attributed to the manager by the plaintiff hardly warrant any such inference or conclusion. A like comment properly should be made concerning the further assertion in plaintiff's affidavit that he "was required

to be segregated'. What that loose expression means is anyone's guess. From whom was he segregated? The affidavit does not say. Was he segregated from his family or from his friends, acquaintances or associates, from those who desired his company and he theirs? There is nothing in the affidavit to indicate such to be true. Was he segregated from people whom he did not know and who did not care to know him? The affidavit is silent as to that also. But suppose he was segregated from people who did not care for his company or association, what civil right of his was thereby invaded? If he was trying to invade the civil rights of others, an injunction might be more properly invoked against him to protect their civil rights. I know of no civil or uncivil right that anyone has, be he white or colored, to deliberately make a nuisance of himself to the annoyance of others, even in an effort to create or stir up litigation. The right to equality before the law, to be free from discrimination, invests no one with authority to require others to accept him as a companion or social equal. The Fourteenth Amendment does not reach that low level. Even whites, as yet, still have the right to choose their own companions and associates, and to preserve the integrity of the race with which God almighty has endowed them.

Neither in the affidavit nor in the complaint of the plaintiff is there any averment or allegation that whatever the defendants may have done to the plaintiff was done at the direction or under color of state law. It is nowhere stated in

either what right the plaintiff claims was denied him under color of state law. A state law was passed in 1928 that "created a Commission \* \* \* to be known as Greenville Airport Commission". That Commission consists of five members, two selected by the City Council of the City of Greenville, two by the Greenville County Legislative Delegation, and the fifth member by the majority vote of the other four. The Commission so created is "vested with the power to receive any gifts or donations from any source, and also to hold and enjoy property, both real and personal, in the County of Greenville, \* \* \* *for the purpose of establishing and maintaining aeroplane landing fields* \* \* \*; and to make such rules and regulations as *may be necessary in the conduct and operation of said aeroplane landing fields.*" (Emphasis added). Further, the Act authorizes the 'The City of Greenville \* \* \* to appropriate and donate to said Commission such sums of money as it may deem expedient and necessary for the purpose aforesaid'. There is nothing in the Act that requires that Commission to maintain waiting rooms of any sort, segregated or unsegregated.

There is nothing in the affidavit or complaint of the plaintiff which could be tortured into meaning that the defendants had denied the plaintiff the use of the authorized airport landing fields. He had a ticket which authorized him to board a plane there. He was not denied that right. In fact there is no clear cut statement of any legal duty owed the plaintiff that defendants breached; and

there is no showing that the plaintiff was damaged in any amount by anything done by the defendants, or by any one of them, under color of state law."

\* \* \* \* \*

"The jurisdiction of this court is invoked by the plaintiff under Section 1343, Title 28, U. S. Code. It is appropriate, therefore, that we consider the extent of the jurisdiction that is therein conferred on this court. By it district courts are given jurisdiction of civil actions " \* \* \* to redress the deprivation, under color of state law, \* \* \* of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens \* \* \*. Hence we must look to the complaint to ascertain (1) what right plaintiff claims he has been deprived of, (2) secured by what constitutional provision or Act of Congress providing for equal rights of citizens, and (3) under color of what state law? It is not enough for the plaintiff to allege that he has been deprived of a right or a privilege. He must go further and show what right, or privilege, he has been deprived of, by what constitutional provision or Act of Congress it is secured, and under color of what state law he has been deprived of his stated right. If the plaintiff fails to allege any one or more of the specified elements his action will fail as not being within the jurisdiction of this court.

As pointed out hereinabove, there is no allegation in the complaint that anything complained of was done under color of a specified state law.

The Court has been pointed to no state law requiring the separation of the races in airport waiting rooms, and its own research has developed none. Moreover, there is no state law that has been brought to the Court's attention, or that it has discovered, which requires the defendants, or anyone else, to maintain waiting rooms at airports, whether segregated or unsegregated. Hence the advice which it is alleged that the 'purported manager' of the Airport gave the plaintiff, saying 'we have a waiting room for colored folks over there,' could not have been given under color of a state law since there is no state law authorizing or commanding such action.

In connection with the tendered issue of the court's jurisdiction, plaintiff claims that he has a cause of action arising under Section 1981, Title 42, U. S. Code. It provides:

"All persons within the jurisdiction of the United States shall have the same right in every state \* \* \* to the full and *equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind \* \* \*"  
(Emphasis added).

The undoubted purpose of Congress in enacting Section 1981, was to confer on negro citizens rights and privileges equal to those enjoyed by white citizens and, at the same time, to impose on them like duties and responsibilities. The court's attention

has been directed to no law that confers on any citizen, white or negro, the right or privilege of stirring up racial discord, of instigating strife between the races, of encouraging the destruction of racial integrity, or of provoking litigation, especially when to do so the provoker must travel a great distance at public expense.

It is inferable from the complaint that there were waiting room facilities at the airport, but whether those accorded the plaintiff and other negroes were inferior, equal or superior to those accorded white citizens is not stated. It is also inferable from the complaint that the plaintiff did not go to the waiting room in quest of waiting room facilities; but solely as volunteer for the purpose of instigating litigation which otherwise would not have been started. The Court does not and should not look with favor on volunteer trouble makers or volunteer instigators of strife or litigation. A significant feature of Section 1981, which by some is little noticed and often ignored, is that it places squarely on negroes obligations, duties and responsibilities equal to those imposed on white citizens, and that said Section does not confer on negroes rights and privileges that are superior and more abundant than those accorded white citizens.

Williams v. Howard Johnson's Restaurant, et. al. argued before the Fourth Circuit Court of Appeals June 15, 1959, is in many respects similar to the instant case. As here, the plaintiff had a government job. He went from his place of public employment into the State of Virginia to demand that



he be served in a restaurant known to him to be operated by its owner, the defendant, solely for white customers. He invoked the jurisdiction of the court both on its equity side and on its law side for himself and for other negroes similarly situated. The suit was dismissed by the district court. Upon the hearing it was conceded that no statute of Virginia required the exclusion of negroes from public restaurants. Hence the Fourteenth Amendment didn't apply. No action was taken by the defendant under color of state law. Notwithstanding the absence of a state law applicable to the situation, the plaintiff argued that the long established local custom of excluding negroes from white restaurants had been acquiesced in by Virginia for so long that it amounted to discriminatory state action. The Appellate Court disagreed, and so do I. As pointed out in Judge Soper's opinion in the Howard Johnson case. 'This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices.' Further Judge Soper said:

'The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in *Shelly v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 842 (1950 L.ED. 1161):

'Since the decision of this court in the Civil Rights Cases, 1883, 109 U. S. 3 \* \* \* the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is *only such action as may fairly be said to be that of the States*. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' " (Emphasis supplied)

To say that the right of one person ends where another's begins has long been regarded as a truism under our system of constitutional government. While the rights and privileges of all citizens are declared to be equal by our constitution there is no constitutional command that they be exercised jointly rather than severally; and, if there were such a constitutional command, the rights and privileges granted by the constitution would be by it also destroyed. A constitution so written or interpreted would be an anomaly."

In the case of *Wilmington Parking Authority and Eagle Coffee Shoppe, Inc. versus Burton*, (Del. - 1960) 157 A. 2d. 894, a Delaware Negro citizen was refused service because of race by a Wilmington restaurant located in a leased space in a public parking building owned by the Wilmington Parking Authority, a state agency. He brought a class action in a state chancery court asking for a declaratory judgment that such discrimination violated the Fourteenth Amendment and for injunctive relief.

On appeal the state supreme court reversed the trial court.

The appellate court held the fundamental problem to be whether the state, directly or indirectly, 'in reality', created or maintained the facility at public expense or controlled its operation; for only if such was the case the Fourteenth Amendment would apply.

The court held that the Authority did not locate the restaurant within the building for the convenience and service of the public using the parking facilities and had not, directly or indirectly, operated nor financially enabled it to operate.

It was held the Authority's only concern in the restaurant—the receipt of rent which defrayed part of the operating expense of providing the public with off-street parking—was insufficient to make the discriminatory act that of the state. And the fact that the City of Wilmington had originally 'advanced' 15% of the facilities, cost (the balance being financed by an Authority bond issue) was held not to make the enterprise one created at public expense for 'slight contributions' were insufficient to cause that result.

Finally, it was held the fact that the leasee sold alcohol beverages did not make it an inn or tavern, which by common law must not deny service to any one asking for it; rather, it functioned primarily as a private restaurant, which by common law and state statute might deny service to anyone offensive to other customers to the injury of its business.

"We think the case before us is distinguishable from the cases relied on by the plaintiff. In the first place, it is quite apparent, nor is there any suggestion to the contrary made by the plaintiff, that the establishment of a restaurant in the space occupied by Eagle is a pure happenstance and was not intended as a service to the public using the parking facility. As far as the record before us indicates, it was immaterial to the Authority what type of business would occupy the space now occupied by Eagle. The Authority's sole interest was in the obtaining of money in the form of rent. That money is thereafter used by the Authority to support the public purpose of supplying off-street parking from which the plaintiff and the rest of the public benefit.

It is further clear from this record, and from the Ranken case, that at no time did the Authority contemplate the establishment of a restaurant in the structure for the use of its parking patrons. On the contrary, the commercial leases entered into by the Authority were given to the highest bidders in terms of rent after the solicitation of bids by public advertisement. The decision to lease to a particular lessee was made upon the considerations of the applicants' financial responsibility and the amount of rent agreed to be paid. It is thus apparent that this case completely lacks the element of furnishing service to the public through the means of a lease to private enterprise. The only purpose for this lease is to supply a portion of the additional money required to permit

the Authority to furnish the only public service it is authorized to furnish, viz., public off-street parking.

The plaintiff argues that the use of public money to purchase a portion of the land required brings this case within the rule of the cited authorities. But we think not. At the most, approximately 15% of the total cost is represented by the public 'advance' of money. To accept the plaintiff's view would require us in all similar cases to measure the respective contributions made by public and private money and to determine at what point the public contribution changes the nature of the enterprise. It is obvious that there is no guide for judicial speculation upon such a change. If it is said that the contribution of any public money is sufficient to change the nature of the enterprise, the answer is that it has been held that a slight contribution is insufficient. Cf. *Eaton v. Board of Managers*, D. C. 164 F. Supp. 191.

Fundamentally, the problem is to be resolved by considerations of whether or not the public government, either directly or indirectly, in reality, is financing and controlling the enterprise which is charged with racial discrimination. If such is the case, then the Fourteenth Amendment applies; if it is not the case, the operators of the enterprise are free to discriminate as they will. *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 842, 91 L. Ed. 1161. We neither condemn nor approve such private discriminatory practices for the courts are not the keepers of the morals of the public. We

apply the law, whether or not that law follows the current fashion of social philosophy.

Particularly is this true of a state court which is called upon in this field to apply rules made for us by the Supreme Court of the United States which, in the case of this state, have resulted in the discard of a large portion of our local law dealing with the emotional subject of racial relations. We are, of course, bound to follow the Federal decisions, but we think we are equally bound, when they erode our local law, not to extend them to a point beyond which they have not as yet gone.

We think the Authority and, through it, the State of Delaware does not operate, either directly or indirectly, the business of Eagle; has not located the business of Eagle within the facility for the convenience and service of the public using the parking service; and has not financially enabled the business of Eagle to operate. The only concern the Authority has with Eagle is the receipt of rent, without which it would be unable to afford the public the service of off-street parking. This circumstance, we think, is not sufficient to make the discriminatory act of Eagle the act of the State of Delaware.

It follows, therefore, that Eagle, in the conduct of its business, is acting in a purely private capacity. It acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other re-

tail business is required to sell its product to every one. This is the common law, and the law of Delaware as restated in 24 Del C Par. 1501 with respect to restaurant keepers. 10 Am. Jur., Civil Rights PP 21, 22; 52 Am Jur. Theatres PP 9; Williams v. Howard Johnson's Restaurant, 4 Cir. 268 F. 2d. 845. We, accordingly, hold that the operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment.

Finally, plaintiff contends that 24 Del. C. PP 1501, has no application in the case at bar because Eagle, since it serves alcoholic beverages to its patrons, is a tavern or inn and not a restaurant. It is argued that, at common law, an inn or tavern could deny services to no one asking for it. We think, however, that Eagle is primarily a restaurant and thus subject to the provisions of 24 Del. C. PP 1501, which does not compel the operator of a restaurant to give service to all persons seeking such."

In the case of Slack v. Atlantic White Tower System, Inc., (U.S. Dist. Court, Maryland, 1960), 181 F. Supp. 124, a Negress, who because of race had been refused food service by a Baltimore, Maryland, restaurant (one of an interstate chain owned by a Delaware Corporation) brought a class action in federal court for declaratory judgment and injunctive relief against the corporate owner claiming that her rights under the constitution and laws of the United States had been thereby denied.



The court held that segregated restaurants in Maryland were not required by any state statute or decisional law, but were the result of individual proprietors' business choice.

The court also rejected plaintiff's argument that defendant as a licensee of the state to operate a public restaurant, had no right to exclude plaintiff from service on a racial basis; rather, the restaurant's common law right to select its clientele (even on a color basis), was still the law of Maryland.

Plaintiff's further contention that the state's admission of this foreign corporation and issuance of a restaurant license to it 'invests the corporation with a public interest' sufficient to make its racially exclusive action the equivalent of state action was likewise rejected, the court holding that a foreign corporation had the same rights as domestic business corporations, and that the applicable state license laws were not regulatory. And statements in white primary cases, that when individuals or groups "move beyond matters of merely private concern" and "act in matters of high public interest" they become "representatives of the State" subject to Fourteenth Amendment restraints, were held inapposite to this type situation where defendant had not exercised any powers similar to those of a state or city.

The Court said:

"Plaintiff seeks to avoid the authority of *Williams v. Howard Johnson's Restaurant*, 4 Cir., 268 F. 2d, 845, by raising a number of points not

discussed therein, and by arguing that in Maryland segregation of the races in restaurants is required by the State's decisional law and policy, whereas, she argues, that was not true in Virginia, where the Williams case arose. She also contends that the Williams case was improperly decided and should not be followed by this Court.

\* \* \* \* \*

Such segregation of the races as persists in restaurants in Baltimore is not required by any statute or decisional law of Maryland, nor by any general custom or practice of segregation in Baltimore City, but is the result of the business choice of the individual proprietors, catering to the desires or prejudices of their customers.

Plaintiff's next argument is that defendant, as a licensee of the State of Maryland operating a public restaurant or eating facility, had no right to exclude plaintiff from its services on a racial basis. She rests her argument on the common law, and on the Maryland license law.

In the absence of statute, the rule is well established that an operator of a restaurant has the right to select the clientele he will serve, and to make such selection based on color, if he so desires. He is not an innkeeper charged with a duty to serve everyone who applies. *Williams v. Howard Johnson's Restaurant*, 268 F. 2d. at 847; *Alpaugh v. Wolverton*, 184 Va. 943; *State v. Clyburn*, 101 S. Ed. 2d. 295; and authorities cited in those cases. There is no restaurant case in Maryland, but the

rule is supported by statements of the Court of Appeals of Maryland in *Grenfeld v. Maryland Jockey Club*, 190 Md. 96, 102, and in *Good Citizens Community Protective Association v. Board of Liquor License Commissioners*, 217 Md. 129, 131.

Art. 56, Secs. 151 et. seq., of the Ann. Code of Md., 1939 ed. (163 et seq of the 1957 ed), deals with licenses required of persons engaged in all sorts of businesses. Secs. 166 (now 178) provides: 'Each person, firm or corporation, resident or non-resident, operating or conducting a restaurant or eating place, shall, before doing so take out a license therefor, and pay an annual license fee of Ten Dollars (\$10.00) for each place of business so operated except that in incorporated towns and cities of 8,000 inhabitants or over, the fee for each place of business so operated shall be Twenty-Five Dollars (\$25.00)'. The Attorney General of Maryland has said that 'A restaurant is generally understood to be a place where food is served at a fixed price to all comers, usually at all times.' This statement was made in an opinion distinguishing a restaurant from a boarding house for licensing purposes. 5 Op. Atty. Gen. 303. It was not intended to express opinion contrary to the common law right of a restaurant owner to choose his customers. The Maryland Legislature and the Baltimore City Council have repeatedly refused to adopt bills requiring restaurant owners and others to serve all comers regardless of race; several such bills are now pending. See Annual Report of Commission, January 1960, p. 29.

Plaintiff contends that defendant is engaged in interstate commerce, that its restaurant is an instrumentality or facility of interstate commerce and thus subject to the constitutional limitations imposed by the Commerce Clause (Const. Art. 1 sec 8); and that defendant's refusal to serve plaintiff, a traveler in interstate commerce, constituted an undue burden on that commerce.

A similar contention was rejected in *Williams v. Howard Johnson's Restaurant*, 268 F. 2d. at 848. It would be presumptuous for me to enlarge on Judge Soper's opinion on this point.

'The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the states. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful'. *Shelley v. Kraemer*, 334 U.S. 1, 13. Plaintiff seeks to avoid this limitation by arguing that the admission by the state of a foreign corporation and the issuance to it of a license to operate a restaurant 'invests the corporation with a public interest' sufficient to make its action in excluding patrons on a racial basis the equivalent of state action.

The fact that defendant is a Delaware corporation is immaterial. Once admitted to do business in the State of Maryland, it has the same rights and duties as domestic corporations engaged in the same business. This factor does not distinguish the case from *Williams v. Howard Johnson's Restaurant*, where the state action question was discussed at p. 847.

The license laws of the State of Maryland applicable to restaurants are not regulatory. See *Maryland Theatrical Corp. v. Brennan*, 180 Md. 377, 381, 382. The City ordinance, No. 1145, November 27, 1597, adding Sec. 60-1 $\frac{1}{2}$  to Art. 12 of the Baltimore City Code, 1950 ed. which was not offered in evidence or relied on by plaintiff, is obviously designed to protect the health of the community. Neither the statute nor the ordinance authorizes State or City officials to control the management of the business of restaurant or to dictate what persons shall be served.

Even in the case of licensees, such as race tracks and taverns, where the business is regulated by the state, the licensee does not become a state agency, subject to the provisions of the Fourteenth Amendment, *Madden v. Queen's County Jockey Club*, 296 N. Y. 243, 72 N. E. 2d. 697, cert. den. 332 U. S. 761, cited with approval in *Greenfeld v. Maryland Jockey Club*, 190 Md. at 102; *Good Citizens Community Protective Association v. Board of Liquor License Commissioners* 217 Md. 129. No doubt defendant might have had plaintiff arrested if she had made a disturbance or remained at a table too long after she had been told that she would only be sold food to carry out to her car. But that implied threat is present whenever the proprietor of a business refuses to deal with a customer for any reason, racial or other, and does not make his action state action or make his business a state agency. Plaintiff cites *Valle v. Stengel*, 3 Cir. 176 F. 2d. 697. In that case a sheriff's

eviction of a negro from a private amusement park was a denial of equal protection of the laws because under the New Jersey antidiscrimination law the Negro had a legal right to use the park facilities.

Plaintiff cites such cases as *Nixon v. Condon*, 286 U. S. 73, and *Smith v. Allwright* 321 U.S. 649, for the proposition that when individuals or groups 'move beyond matters of merely private concern' and 'act in matters of high public interest' they become 'representatives of the State' subject to the restraints of the Fourteenth Amendment. The distinction between holding a primary election and operating a restaurant is obvious, and has always been recognized by the courts. Defendant has not exercised powers similar to those of a state or city.

In *Kerr v. Enoch Pratt Free Library of Baltimore City*, 4 Cir. 149 F. 2d. 212, also relied on by plaintiff, 'the Library was completely owned and largely supported \* \* \* by the City; \* \* \* in practical effect its operations were subject to the City's control', as the Fourth Circuit pointed out in distinguishing the Library case from *Eaton v. Board of Managers of the James Walker Memorial Hospital*, 4 Cir. 261 F. 2d. 521, 527.

The argument that state inaction in the face of uniform discriminatory customs and practices in operating restaurants amounts to state action was rejected in *Williams v. Howard Johnson's Restaurant*, 4 Cir. 268, F. 2d. 845. Moreover, as we

have seen, the factual premise for the argument is not found in the instant case."

In the case of *Fletcher versus Coney Island, Inc.* (Ohio 1956), 134 N. E. 2d. 371, a Negro woman sought to enjoin the operator of a private amusement park from refusing her admittance because of her race or color.

In holding that defendant's remedy was to proceed under the State's anti-discrimination law, and not by way of injunction, the Supreme Court of Ohio said:

"In the case of *Madden v. Queens County Jockey Club, Inc.*, 296 N. Y. 249, 253, 72 N. E. 2d. 697, 698, 1 A. L. R. 2d. 1160, 1162, the generally recognized rule is stated as follows:

'At common law a person engaged in a public calling, such as an inkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. \* \* \* On the other hand, proprietors of private enterprises such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. \* \* \*

*"The common-law power of exclusion, noted above, continues until changed by legislative enactment."* (Emphasis supplied.)

"See also *Bailey v. Washington Theatre Co.*, 218 Ind. 34 N. J. 2d. 17; annotation, 1 A. L. R. 2d. 1165; and 10 American Jurisprudence 915, Section 22."



"It will be thus observed that the owner or operator of a private amusement park or place of entertainment may arbitrarily and capriciously refuse admittance to whomsoever he pleases, be they Africans, Chinese, East Indians, Germans, Italians, Poles, Russians or any other racial group, in the absence of legislation requiring him to admit them."

\* \* \* \* \*

"In summary, the decision in this case rests squarely on the proposition that at common law those who own and operate private places of amusement and entertainment can admit or exclude whomsoever they please, and that, since such establishments are open to all only through legislative enactments, those enactments govern the situation, and where as a part of those enactments a specific remedy or penalty is prescribed for their violation, such remedy or penalty is exclusive. The adequacy or appropriateness thereof being a matter of legislative concern. This decision is limited to this precise point and should be so read and appraised.

It should be obvious that the present case bears no relation whatsoever to the problem of the segregation of pupils in the public schools, or to the exclusion of a qualified person from an institution of higher learning supported by public funds or a person from a publicly owned or operated park or recreation facility, because of his race or color."

In the case of *Tamelleo, et al. v. New Hampshire Jockey Club, Inc.*, (N. H. 1960), 163 A. 2d. 10, the plain-

tiffs presented themselves at the defendant's race track but were refused admission by the action of one of defendant's agents who ordered them to leave the premises because in his judgment their presence was inconsistent with the orderly and proper conduct of a race meeting. The plaintiffs then left the premises and thereafter instituted these proceedings.

The court said:

"It is firmly established that at common law proprietors of private enterprises such as theatres, race tracks, and the like may admit or exclude anyone they choose. *Woolcott v. Shubert*, 217 N. Y. 212, 222, 111 N. E. 829, L. R. A. 1916 E. 248; *Madden v. Queens County Jockey Club*, 296 N. Y. 249, 72 N. E. 697, certiorari denied 332 U. S. 761, 68 S. Ct. 63, 922 Ed. 346; 1 A. L. R. 2d 1165 annotation; 86 C. J. S. Theatres and shows, sec. 31. While it is true, as the plaintiffs argue and the defendants concede, that there is no common-law right in this state to operate a race track where pari-mutuel pools are sold, horse racing for a stake or price is not gaming or illegal. Opinion of the Justices, 73 N. H. 625, 631, 63 A. 505.

"However, the fact that there is no common-law right to operate a pari-mutuel race track is not decisive of the issue before us. The business is still a private enterprise since it is affected by no such public interest so as to make it a public calling as is a railroad for example. *Garifine v. Monmouth Park Jockey Club*, 29 N. J. 47, 148 A. 2d. 1; *Madden v. Queens County Jockey Club*, su-

pra. Regulation by the state does not alter the nature of the defendant's enterprise, nor does granting a license to conduct pari-mutuel pools. *North Hampton Racing and Breeders Association v. New Hampshire Racing Commission*, 94 N. H. 156, 159, 48 A. 2d. 472; *Greenfeld v. Maryland Jockey Club*, 190 Md. 96, 57 A. 2d. 325. As the *North Hampton* case points out, regulation is necessary because of the social problem involved. *Id.*, 94 N. H. 159, 48 A. 2d. 475.

"We have no doubt that this state adheres to the general rule that the proprietors of a private calling possess the common-law right to admit or exclude whomever they choose. In *State v. United States & C. Express*, 60 N. H. 219, after holding that a public carrier cannot discriminate, *Doe, C. J.*, stated, 'Others, in other occupations, may sell their services to some, and refuse to sell to others.' *Id.* 60 N H 261." (Emphasis supplied.)

"In *Batchelder v. Hibbard*, 58 N. H. 269, the Court states that a license, sofar as future enjoyment is concerned, may be revoked any time. A ticket to a race track is a license and it may be revoked for any reason in the absence of a statute to the contrary. *Marrone v. Washington Jockey Club*, 227 U. S. 633, 33 S. Ct. 401, 61 L. Ed. 679."

\* \* \* \* \*

"The plaintiffs also contend that if this be our law, we should change it in view of altered social concepts. This argument ignores altogether certain rights of owners and taxpayers, which still

exist in this state, as to their own property. Furthermore, to adopt the plaintiff's position would require us to make a drastic change in our public policy which, as we have often stated, is not a proper function of this court.

"The plaintiffs take the position that R. S. A. 284: 39, 40 as inserted by Laws 1959, c. 210, sec. 14, is invalid as an unconstitutional delegation of legislative power. We cannot agree. Laws 1959, c. 210 is entitled: 'An act relative to Trespassing on Land of Another and at Race Tracks and Defining Cultivated Lands'. Section 4 (R. S. A. 284:39, under the heading 'Trespassing' reads as follows: 'Rights of Licensee. Any licensee hereunder shall have the right to refuse admission to and to eject from the enclosure of any race track where is held a race or race meet licensed hereunder any person or persons whose presence within said enclosure is in the sole judgment of said licensee inconsistent with the orderly and proper conduct of a race meeting.' As applied to this case this provision is substantially declaratory of the common law which permits owners of private enterprises to refuse admission or to eject anyone whom they desire. *Garifine v. Monmouth Park Jockey Club*, 29 N. J. 47, 148 A. 2d. 1.

"The penalty provision, section 4 (R. S. A. 284:40) states: 'Penalty. Any person or persons within said enclosure without right or to whom admission has been refused or who has previously been ejected shall be fined not more than one hundred dollars or imprisoned not more than one year or

both. This provision stands no differently than does that imposing a penalty upon one who enters without right the cultivated or posted land of another. R. S. A. 572:15 (supp) as amended. One charged with either of these offenses or with trespass at a race track would of course have a right to trial and the charge against him would have to be proved, as in any other criminal matter. No license to pass any law is given to the defendant. The situation is clearly unlike that condemned in *Ferretti v. Jackson*, 88 N. H. 296, 188 A. 474, and *Opinion of the Justices*, 88 N. H. 497, 190 A. 713, upon which the plaintiffs rely, where the milk board was given unrestricted and unguided discretion, in effect, to make all manners of laws within the field of its activity. It thus appears that there is no unlawful delegation of legislative powers in the present case."

In the case of *Hall v. Commonwealth*, (Va. 1948) 49 S. E. 2d. 369, Appeal Dismissed, See 69 S. Ct. 240, a Jehovah's Witness, was convicted for trespassing on private property. He sought appellate relief on the ground that the conviction violated his right to freedom of speech, freedom of the press, freedom of assembly, and freedom of worship guaranteed to him by the Constitutions of the United States and the State of Virginia.

The court said:

"The statute under which the accused was prosecuted is Chapter 165, Acts of 1934, sec. 4480a, Michie's 1942 Code, which provides: 'That if any

person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge or possession of such land he shall be deemed guilty of a misdemeanor, etc. . . . .

"Mr. Justice Black in *Martin v. City of Struthers*, 319 U. S. 141, at page 147, 63 S. Ct. 862, at page 865, 87 L. Ed. 1313, speaking of this particular statute and other statutes of similar character, said: 'Traditionally the American Law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more.'

"We find nothing in the statute when properly applied which infringes upon any privilege or right guaranteed to the accused by the Federal Constitution."

"The most recent expressions of the Supreme Court of the United States on this subject are found in *Marsh v. Alabama*, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265, and *Tucker v. Texas*, 326 U. S. 517, 66 S. Ct. 274, 90 L. Ed. 274, both of which were decided by a divided court.

"In concluding the discussion the New York court said: 'Our purpose in thus briefly analyzing

those decisions (*Marsh v. Alabama* and *Tucker v. Texas*) is to show that they do not (nor do any others of which we know) go nearly so far as appellants would have us go here. Parkchester, like Chickasaw, Alabama, and the Federal housing community in Texas, is privately owned, but there the similarity as to facts ends. It is undisputed that this defendant has never sought in any way to limit the Witnesses' activities on the streets or sidewalks of Parkchester some of which are privately and some publicly owned. The discrimination which this defendant's regulation inhibits was not on the streets, sidewalks or other public or quasi-public places, but inside of and into, the several floors and inner hallways of multiple dwellings.

\* \* \* \* \*

"We think the Bohnke case, *supra*, is still the law and leaves solid the regulation of door-to-door calls along public streets. But regardless of the Bohnke ruling, no case we know of extends the reach of the bill of rights so far as to prescribe the reasonable regulation by an owner, of conduct inside his multiple dwelling. So holding, we need not examine the larger question of whether the pertinent clauses of the Constitutions have anything to do with rules made by any dwelling proprietors, governing conduct inside their edifices."

In the case of *State versus Hunter*, 114 So. 76, 164 La. 405, 55 A. L. R. 309, *Aff. Hunter v. State of La.*, 48 S. Ct. 158, 205 U. S. 508, 72 L. Ed. 393, the Supreme Court of Louisiana said:



"The defendant was convicted of the offense of going on the premises of a citizen of the state, in the nighttime, without his consent, and moving or assisting in moving therefrom a tenant and his property or effects. \* \* \* The offense was a violation of the Act No. 38 of 1926, p. 52; which makes it unlawful to go on the premises or plantation of a citizen of this state, in the nighttime or between sunset and sunrise, without his consent, and to move or assist in moving therefrom any laborer or tenant. The act declares that it does not apply to what is done in the discharge of a civil or military order."

\* \* \* \* \*

"The defendant pleaded that the statute was violative of the guaranty in the second section of Article 4 of the Constitution of the United States that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and was violative also of the provision in the Fourteenth Amendment that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; and violative of the due process clause and the equal protection clause of the Fourteenth Amendment."

\* \* \* \* \*

"On the occasion referred to in the bill of information he, (defendant) went upon the plantation of one T. D. Connell, a citizen of Louisiana, in the nighttime and without Connell's consent and moved from the plantation to the state of Arkansas a tenant of Connell and the tenant's property or

effects. The defendant was employed by Cornell's tenant to do the hauling, and was not discharging any civil or military order. Some of the plantations in that vicinity were owned by citizens of Louisiana and some by persons not citizens of Louisiana. For several months previous to the occasion complained of the defendant was engaged in hauling persons and their property and effects, in the ordinary course of his business, and regardless of whether any of the persons moved were laborers or tenants on premises owned by a citizen of Louisiana or by a citizen of another state.

"The statute is not an unreasonable exercise of the police power of the state. It merely forbids a person having no right to be on the premises of another to go there in the nighttime and without the proprietor's consent — and therefore as a trespasser — and to move or assist in moving from the premises a laborer or tenant or his property or effects. The purpose of the statute, manifestly, is to preserve the right of every landlord or employer of farm labor to be informed of the removal from his premises of any personal property or effects. Without a statute on the subject it would be unconventional in the rural districts, to say the least, for an outsider to take the liberty of going upon the premises of another in the nighttime to cart away personal property or effects, without the landowner's consent. The statute does not discriminate with regard to those who may or may not commit the act. It forbids all alike. The discrimination is in what is forbidden. It is not forbidden

— by this particular statute — to trespass upon the land of one who is not a citizen of the state, by going upon his premises in the nighttime without his consent. Perhaps the Legislature used the word "citizen" not in its technical or political sense but as meaning a *resident* of the state, and perhaps the Legislature thought the law would be too harsh if it forbade those engaged in the transfer business to go upon premises belonging to a non-resident — even in the nighttime — without first obtaining his consent. The discrimination, therefore, is not arbitrary or beyond all possible reason. The defendant has no cause to complain that the Legislature did not go further, in enacting the law, and forbid a similar act of trespass upon the premises of a citizen of another state. If he had the right to complain of such discrimination, we would hold that the statute does not deprive the citizens of other states, owning land in this state, of any privilege or immunity guaranteed to the landowners who are citizens of this state. The privileges and immunities referred to in the second section of Article 4 of the Constitution of the United States are only those fundamental rights which all individuals enjoy alike, except insofar as they are all restrained alike. *White v. Walker*, 136 La. 464, 67 So. 332; *Central Loan & Trust Co. v. Campbell Commission Co.*, 173 U. S. 84, 19 S. Ct. 346, 43 L. Ed. 623. If the trespass committed by the defendant in this case had been committed on land belonging to a citizen of another state, there would have been no violation of

the Act No. 38 of 1926; and in that event the citizen of the other state would have had no means of compelling the Legislature of this state to make the law applicable to his case, or right to demand that the courts should declare the law null because not applicable to his case. All of which merely demonstrates that the statute in question is not violative of the second section of Article 4 of the Constitution of the United States or of the due process clause or equal protection clause of the 14th Amendment."

"These guarantees of freedom of religious worship, and freedom of speech and of the press, do not sanction trespass in the name of freedom. We must remember that personal liberty ends when the rights of others begin. The constitutional inhibition against the making of a law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press does not conflict with the law which forbids a person to trespass upon the property of another."

State v. Martin, et. als. 5 So. 2d. 377. 199  
La. 39.

In support of their plea of unconstitutionality, defendants cite the cases of Shelley v. Kraemer, 334 U. S. 1. 20. 68 S. Ct. 836, 92 L. Ed. 1161, Marsh v. Alabama, 326 U. S. 501, Valle v. Stengel, 176 F. 2d. 697 (3rd. Cir. 1949), and other citations contained in their brief.

The State's freedom of action in protecting the peaceful possession of private property outweighs a tres-

passer's right not to have the state enforce private discriminations. Only when this means of protecting property interests impairs a preferred fundamental right such as freedom of speech, press or religion in a context of great public interest have the courts been inclined to question the constitutionality of a statute. The present state of the law not only recognizes a man's home to be his castle, but allows the state to police his gate and coercively enforce his racial discriminations.

Assuming that arresting the defendants constituted state action (which is denied), the privileges and immunities clause of the 14th. Amendment was not violated because unlike the right to own property (*Shelley v. Kraemer*) which is defined by statute, there is no specific right or privilege to enter the premises of another and remain there after being asked to depart. In fact the civil and criminal laws of trespass and real property, put the privilege of peaceful possession in the owner. An extension of the doctrine of *Shelley v. Kraemer* one step further would mean a holding that the enforcement of a criminal statute, in itself non-discriminatory, could become discriminatory when the complainant prosecutes for discriminatory reasons and thus finding state action that discriminates because of race, creed or color.

For the reasons assigned in the authorities supporting the constitutionality of statutes similar to L. S. A.-R. S. 14:59(6), the Court holds defendants citations to be inapplicable to the factual and legal situation present in the case at bar.

Defendants' contentions are without merit.

The Court holds L. S. A.-R. S. 14:59(6) constitutional, and the bill of information filed thereunder good and sufficient in law.

The motion to quash is overruled and denied.

New Orleans, Louisiana, 28th day of November, 1960.

Sgd J. Bernard Cocke, Judge.  
J U D G E

FILED: Nov. 28 60—(Sgd) E. A. Mouras, Min. Clk.

STATE OF LOUISIANA  
 VERSUS  
 SYDNEY L. GOLDFINCH, JR., DISTRICT COURT  
 ET. ALS. PARISH OF ORLEANS

NO. 168-520—  
 SECTION "E"  
 CRIMINAL

PER CURIAM TO BILL OF EXCEPTION NO. 1

This bill was reserved to the denial of the motion to quash the bill of information.

The motion addresses itself to the constitutionality of L. S. A.-R. S. 14:59(6), the Criminal Mischief statute under which defendants are charged, as well as certain supposed infirmities present in the bill of information.

In passing upon defendants' contentions, the Court filed written reasons upholding the constitutionality of L. S. A.-R. S. 14:59(6), and refusing to quash the bill of information.

The Court makes part of this per curiam the written reasons for judgment.

There is no merit to the bill.

New Orleans, Louisiana, 10th day of January, 1961.

(Sgd) J. Bernard Cocke, Judge.

J U D G E

FILED: Jan. 10/61—(Sgd) E. A. Mouras, Min. Clk.



STATE OF LOUISIANA

VERSUS

NO. 168-520—

SECTION "E"

CRIMINAL

SYDNEY L. GOLDFINCH, JR., DISTRICT COURT

ET. ALS.

PARISH OF ORLEANS

## PER CURIAM TO BILL OF EXCEPTION NO. 2

As will be seen from a reading of the statute under which defendants were prosecuted (L. S. A.-R. S. 14:59(6)), the inquiry sought to be established by defendants was irrelevant and immaterial to any of the issues presented by the bill of information and the charge contained therein.

L. S. A.-R. S. 15:435 provides:

"The evidence must be relevant to the material issues."

L. S. A.-R. S. 15:441 reads in part as follows:

"Relevant evidence is that tending to show the commission of the offense and the intent, or tending to negative the commission of the offense and the intent."

L. S. A.-R. S. 15:442 states, in part:

"The relevancy of evidence must be determined by the purpose for which it is offered."

"A trial judge must be accorded a wide discretion whether particular evidence sought to be introduced in criminal prosecution is relevant to case. L. S. A.-R. S. 15:441."

State v. Murphy, 234 La. 909, 102 So. 2d.) 61.

"Exclusion of testimony on grounds of irrelevancy rests largely on discretion of trial judge."

State v. Martinez, 220 La. 899, 57 So. 2d. 888.

"In order to be admissible, evidence must be both (1) relevant or material, and (2) competent.

Evidence is competent when it comes from such a source and in such form that it is held proper to admit it.

Evidence is relevant when it is persuasive or indicative that a fact in controversy did or did not exist because the conclusion in question may be logically inferred from the evidence. The criterion of relevancy is whether or not the evidence adduced tends to cast any light upon the subject of the inquiry." etc.

Wharton's Crim. Ev. (12th. Ed.) Vol. 1, p. 283.  
Sec. 148.

The bill is without merit.

New Orleans, Louisiana, 10th day of January, 1961.

(Sgd) J. Bernard Cocke, Judge.

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J U D G E

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FILED: Jan. 10/61—(Sgd) E. A. Mouras, Min. Clk.

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STATE OF LOUISIANA      NO. 168-520—  
VERSUS      SECTION "E"  
CRIMINAL  
SYDNEY L. GOLDFINCH, JR., DISTRICT COURT  
ET. ALS.      PARISH OF ORLEANS

PER CURIAM TO BILL OF EXCEPTION NO. 3

The bill was reserved to the denial of defendants' motion to a new trial.

Insofar as the written reasons for denying the motion to quash are applicable to defendants' motion for a new trial the Court submits same as its reasons for denying the said motion.

A reading of the statute under which defendants were prosecuted (L. S. A.-R. S. 14:59(6)), is sufficient refutation to the other allegations of the motion for a new trial, as the matters contended for were irrelevant and immaterial to any of the issues present in the proceedings.

As no request was made of the Court to charge itself on the legal questions raised by defendants in the motion for a new trial, defendants cannot be heard to complain.

The Court was convinced beyond all reasonable doubt, that each and every element necessary for conviction was abundantly proved.

The appellate court is without jurisdiction to pass upon the sufficiency of proof.

New Orleans, Louisiana, 10th day of January, 1961.

(Sgd) J. Bernard Cocke, Judge.

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J U D G E

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FILED: Jan. 10/61—(Sgd) E. A. Mouras, Min. Clk.

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STATE OF LOUISIANA      NO. 168-520—  
 VERSUS      SECTION "E"  
                  CRIMINAL  
 SYDNEY L. GOLDFINCH, JR., DISTRICT COURT  
 ET. ALS.      PARISH OF ORLEANS

PER CURIAM TO BILL OF EXCEPTION NO. 4

This bill was reserved to the denial of defendants' motion in arrest of judgment.

Insofar as the written reasons for denying the motion to quash are applicable to defendants' motion in arrest, the court submits same as its reasons for denying the motion in arrest of judgment.

The remaining contentions of defendants have no place in a motion in arrest of judgment, and were matters of defense.

There is no merit to defendants' bill.

New Orleans, Louisiana, 10th day of January, 1961.

(Sgd) J. Bernard Cocke, Judge.

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J U D G E

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FILED: Jan. 10 61—(Sgd) E. A. Mouras, Min. Clk.

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IN THE

# Supreme Court of the United States

October Term, 1962

No. 58

RUDOLPH LOMBARD, ET AL.,

*Petitioners,*

VS.

LOUISIANA,

*Respondent,*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
THE STATE OF LOUISIANA

## BRIEF FOR PETITIONERS

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IN THE

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**October Term, 1962**

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RUDOLPH LOMBARD, *et al.*,

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vs.

LOUISIANA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
THE STATE OF LOUISIANA

---

**BRIEF FOR PETITIONERS**

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**Opinion Below**

The opinion of the Supreme Court of Louisiana is reported at 241 La. 958, 132 So. 2d 860, under the name of *State v. Goldfinch, et al.* The judgment of the Criminal District Court, Parish of Orleans, overruling the petitioners' motion to quash is in the printed transcript at page 28. No written or oral reasons were given by the trial judge when he found the defendants guilty.

## **Jurisdiction**

The judgment of the Supreme Court of Louisiana was entered on June 29, 1961. Rehearing was refused on October 4, 1961. The petition for a writ of certiorari was filed on December 29, 1961, and was granted on June 25, 1962. The jurisdiction of this Court rests on 28 U. S. C. §1257(3), petitioners claiming rights, privileges and immunities under the Fourteenth Amendment to the Constitution of the United States.

## **Questions Presented**

1. Whether petitioners were deprived, because of various acts of the state described below, of equal protection of the laws guaranteed by the fourteenth amendment.
2. Whether the conviction of petitioners herein violated due process.
3. Whether the decision of the Supreme Court of Louisiana as to the Louisiana statute should be reversed and the conviction of petitioners be set aside.
4. Whether the conviction of petitioners herein denied them the guarantees of free speech provided in the fourteenth and first amendments.
5. Whether the right of a private property holder to call upon the public force is limited by the fourteenth amendment.

### **Statutory and Constitutional Provisions Involved**

1. The Fourteenth Amendment to the Constitution of the United States.
2. The Louisiana statutory provision involved is LSA-R.S. 14:59 (6):

“Criminal mischief is the intentional performance of any of the following acts: \* \* \*

“(6) taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of said business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business.

“Whoever commits the crime of criminal mischief shall be fined not more than five hundred dollars, or imprisoned for not more than one year, or both.”

### **Statement**

#### **A: Facts:**

On September 17, 1960, the petitioners, three Negroes and one white, in an orderly and quiet manner (R. 105, 108), at approximately 10:30 a.m., requested that they be served at a refreshment bar hitherto reserved for whites in McCrory's Five and Ten Cent Store, New Orleans, Louisiana. Because three were Negroes, all were refused service at the bar (R. 105, 113).

The continued presence at the “white” counter of the petitioners, after being informed that there was a “colored” counter (R. 111) was considered by Mr. Graves, restaurant manager, as an “unusual circumstance” (R. 105), or an

"emergency" (R. 105, 106); hence he ordered the counter closed down (R. 105) and called the police (R. 106). At no time did he ask petitioners to leave the store (R. 135, 136, 137).

After the police arrived on the scene, Captain Lucien Cutrera of the New Orleans Police Department advised Mr. Wendell Barrett, the store manager, to tell the petitioners in his presence that the department was closed and to request them to leave the department; Barrett followed the Captain's advice (R. 113, 126). When they did not answer or comply with the request, Major Edward Reuther, of the New Orleans Police Department, ordered petitioners to leave the store within one minute (R. 129).

Reuther testified that first he interrogated the petitioners as to the reason for their presence, and asked "who was the leader?". After being told that they were going to sit there until they were served (R. 116), the petitioners were placed under arrest (R. 129), charged and convicted under LSA-R.S. 14:59 (6). They were each sentenced to pay a fine of \$350.00 and to imprisonment in Parish Prison for sixty days and upon default of the payment of fine to imprisonment for an additional sixty days.

McCrory's is made up of approximately twenty departments (R. 120) and open to the general public (R. 19). Included in its services to the public are eating facilities composed of a main restaurant that seats 210, a counter that seats 53, a refreshment bar that seats 24 and two stand-up counters (R. 104). All of the eating facilities are segregated. There are no signs indicating whether service at any particular counter is limited to either Negro or white (R. 110).

The store's segregation policy is determined by local tradition, law and custom, as interpreted by the manager (R. 21). The manager, Mr. Barrett, testified that his decisions relative to segregated lunch counters within the store conform to state policy, practice and custom (R. 25).

One week prior to the arrests herein, the Superintendent of Police of New Orleans stated that his department would "take prompt and effective action" against persons involved in any such activity as described above (R. 139-140).

Four days before petitioners were arrested, the Mayor of the City of New Orleans made known that he had instructed the Superintendent of Police that no such acts would "be permitted", and directed that they be prohibited by the police department (R. 138-139).

**B. The Actions Below:**

The case was prosecuted in the Criminal District Court for the Parish of Orleans.

Upon the trial, of the five witnesses for the prosecution, three were police officers. The Court refused to permit introduction of testimony, however, as to the cooperation of the store officials and the police officers (R. 23, 24, 127).

At the conclusion of the trial petitioners were found guilty and sentenced; no opinion was filed.

Motions for a new trial were made and denied. The matter was appealed to the Supreme Court of Louisiana, where the convictions were affirmed and rehearing denied. Application for stay of execution for sixty (60) days was granted by the Chief Justice of the Louisiana Supreme Court on October 6, 1961.



## Summary of Argument

I. Petitioners, three Negroes and one white, were arrested and convicted of the crime of "criminal mischief" by the State of Louisiana for participating in a protest against discriminatory treatment by retail establishments which permitted Negroes to spend their money freely at all but the "white" lunch counters. The arrests followed efforts of petitioners to obtain service at the white counter and their refusal to move to the food counter reserved for Negroes.

The officials of the City of New Orleans, the police of that City and the Courts, all cooperated in an effort to convert a lawful act into a crime. Whatever their avowed purpose, their intent was clear—to perpetuate the local custom of segregation of Negroes.

As a result of the involvement of the state, through its various agencies, it is clear that there is no validity in a claim that the state merely acted in aid of a private property owner in the protection of his property rights.

II. It is urged that this Court reverse the decision of the Courts below. The opinion of the Supreme Court of Louisiana is based upon an unconstitutional interpretation of the statute which formed the basis for the charges against petitioners. By its decision, the Supreme Court of Louisiana imputed to the Legislature of Louisiana state support and encouragement for acts of improper discrimination. Nothing in the statute warrants such an interpretation. Since it has been read into the statute by the Courts below, and since no evidence upon which petitioners could have been convicted under a reading of the statute con-

sistent with the Constitution of the United States was adduced at the trial, the decision must be reversed.

III. The public force was called herein, presumably in aid of a private property right. The Courts below erred in not finding that such public force had been used to an extent not permissible under the Fourteenth Amendment. While property rights are created and enforced by the State, protection of property interests by the State may not be for a purpose in violation of the equal protection clause.

IV. The acts of petitioners, peaceful, but meaningful, were an act of silent speech, a protest against segregation of Negroes.

Petitioners were protesting on property open to the public. Since they were in no way disorderly, the arrests by the police constituted an improper inhibition upon speech in violation of the Fourteenth and First Amendments.

V. Under Louisiana law, restaurants are a business requiring a license and thus are affected with a public interest. At no time were petitioners disorderly; admittedly, the only act from which their arrests stemmed was a refusal to move on to the Negro counter. In businesses affected with such a public purpose, although they are labelled "private property" it is improper for the state to enforce segregation of Negroes.

VI. Petitioners endeavored, upon trial, to offer testimony showing the concert of action between the store proprietor and public officials in Louisiana. Such testimony would have tended to show direct state participation in the acts of discrimination. That testimony was refused by the Court, thus denying due process of law to petitioners.

## ARGUMENT

### POINT I

State action has denied petitioners equal protection under the law through the acts of the manager of McCrory's, the police, the prosecutors, and the courts, and through the mayor, the legislature and custom.

**A. The Principle of *Shelley v. Kraemer* applies in this case.**

The law as enunciated in *Shelley v. Kraemer*, 334 U. S. 1, is applicable to the case at bar.

In that case the aid of the Missouri and Michigan courts was sought to enforce a restrictive covenant discriminating against Negroes. In its opinion, judicial functions were described as action of the state by this Court; accordingly, the interventions by the state courts upholding such covenants through injunctive relief were set aside as being a denial of equal protection of the laws.

As in *Shelley*, in the case at bar, the assistance of the state has been sought to maintain a whites only policy and to prevent Negroes from receiving equal treatment.

Affirmed in the *Shelley* case, *supra*, was the view expressed in the Civil Rights Cases 109 U. S. 3, that private acts of discrimination were not inhibited by the Fourteenth Amendment, the Court specifically saying that voluntary adherence to the restrictive covenants did not violate the Fourteenth Amendment. But the intervention of the state judiciary was sufficiently the act of the state to set aside enforcement of the covenant relied upon its purported beneficiaries.

As applied to the case at bar the voluntary adherence doctrine referred to in the *Shelley* case, would presumably be limited to the act of McCrory's in setting up its discriminatory pattern of food service, and asking its customers, in effect, to accept this pattern.

But such are not the facts before us. As in *Shelley*, the assistance of the state has been sought to maintain a whites only policy and to prevent Negroes from receiving equal service, a policy announced, fostered and protected by the state. The concern is not with the right of McCrory's to set up voluntarily a whites only counter; it is with the state participation in its maintenance, and in forcing the public to accept the pattern.

That the seeker of legal relief in *Shelley* was, in a certain sense, a stranger to the immediate sale and purchase of land, whereas before us, the owner of the facility, McCrory's, sought the relief, is of little moment. In each case the aid of the state was sought; in fact, as the record demonstrates, the state participation was greater in the case before us than in *Shelley v. Kraemer*. It is the action of the State in support of private discrimination which makes for the violation of the Fourteenth Amendment and not the name or character of the litigants involved. We submit that state action to deny due process and equal protection was present in the instant case in several forms.

**B. The State Actively Intervened Herein, in That It Encouraged and Adopted Unto Itself the Acts of Discrimination Described.**

(1) One week prior to the arrests herein, the Superintendent of Police of New Orleans, and four days prior thereto, the Mayor of New Orleans, each made clear the

intention of the City of New Orleans to protect acts of discrimination against Negroes.\* In fact the Mayor went so far as to give instructions to arrest persons who peacefully sought, and hopefully awaited, service at retail stores (R. 138). At the trial, petitioner sought to introduce evidence concerning the nature of the interaction and cooperation between these public officials and the retail store owners, particularly McCrory's. The Court refused to admit testimony on this point (R. 23-27, 127).

While voluntary private adherence to a discriminatory pattern may not be violative of the Fourteenth Amendment, the act of the state, through the New Orleans officials, in advising storekeepers in advance that the Police would not permit peaceful acts such as were engaged in by petitioners, we urge is such a violation. The City tells such store owners that they should seek the assistance of the police in maintaining inequality; this thereby becomes not a matter between private parties. Both during and immediately before the acts of the petitioners, the full weight of the state was invoked in favor of discriminatory treatment of Negroes.

Had not the public authorities expressed themselves and intervened, what action McCrory's would have taken is speculative; but not unreasonably, so; one of the possibilities, because of the peaceful nature of the acts of petitioners involved, is that no call to the police would have been made, and accordingly, no arrests made.

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\* These statements conformed to official state policy as expressed in Louisiana Act 630 of 1960, which in its preamble states:

"Whereas, Louisiana has always maintained a policy of segregation of the races, and

Whereas, it is the intention of the citizens of the sovereign state that such a policy be continued."

As Mr. Justice Frankfurter said in his concurring opinion in *Garner v. Louisiana*, 368 U. S. 157 "It is not fanciful speculation, however, that a proprietor who invites trade in most parts of his establishment and restricts it in another, may change his policy when non-violently challenged."\*

(2) When petitioners sought service at the white counter, the counter immediately was closed and the police called. Shortly thereafter, various policemen arrived and advised the store manager, "That we must witness his statement to them that he didn't want them in the place" (R. 125-126). The manager was thus instructed by the police to order petitioners away in their presence.

The police were called to assist and enforce McCrory's efforts to maintain segregation in food service (it is to be remembered that the practice related *only* to food service, and not other departments of the store). The police insisted on being official witnesses; after hearing the manager order petitioner to leave the *department* (R. 113), the police then ordered them from the *store* (R. 123). Thus not only were the New Orleans Police official witnesses to a private act of discrimination, but, in fact, became, by their direct intervention and order to petitioners to leave the store, principal parties to an act of discrimination. This was followed by the arrest of petitioners and the charge of violation of the criminal statute referred to placed against them.

(3) The prosecution of the case against petitioners was conducted under the aegis of the District Attorney of the Parish of Orleans.

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\* The accuracy of this position is borne out by fact. The New York Times, Sept. 13, 1962, on p. 41 reported that McCrory's, among other New Orleans retail establishments, desegregated its lunch counters.

(4) While the hearing of the case by the Court, of course, does not throw the weight of the state behind the acts denying equal protection of the law to petitioners, the conviction by the judge, sitting without a jury, no less than the injunction in *Shelley v. Kraemer, supra*, becomes the act of the state. Incarceration in a jail maintained by Louisiana (which awaits petitioners if their conviction should be affirmed by this Court) is similarly no less an act of the state than the injunction in the *Shelley* case. The power to punish is the ultimate expression of state intervention.

**C. Louisiana Avoided the Obligation of a State to Preserve Impartial Administration of Law.**

While it may be true, as the Court below asserts, that without the will of the proprietor the state "can find no basis under the statute to prosecute", it is no less true that without the state to advise the proprietor, to arrest, to prosecute, to judge and finally to incarcerate petitioners the so-called "will" of the proprietor might not have been made known overtly in any fashion. It is also suggested that without the actions of the state, this so-called "will", described by the Court below, may reasonably have been non-existent; the problem for which petitioners presently seek relief from this Court would also be non-existent.

We urge that it is specious to suggest that in the case at bar the state is playing the role of a referee in a battle between private litigants. No disorder occurred warranting the intervention of the state. By its intervention, the state prevented a negotiated, or freely arrived at, contractual solution of the problem. It is not far fetched to say that the offer to purchase made by petitioners to



McCrory's might eventually have been accepted if the state had not acted to prevent just such an acceptance.

Whether that would have occurred in this case is not known, but clearly, intervention by the state prevented a peaceful solution, and made impossible a freely arrived at agreement in support of social progress. The acts of the state not only inhibited a peaceful concurrence but actually were in aid of social disintegration.

To pretend that the state was, as Louisiana has suggested, a neutral party in this matter is either to indulge in fantasy, or to attempt to create an air of subterfuge through which the "game" of segregation is still "played" even though the characters wear slightly different masks. The proprietor of the store plays only a small role in this charade; the main parts belong to the State. In any event the victim is the same and same jail is used.

For all the reasons we have urged, we respectfully suggest that the doctrines enunciated in *Shellen v. Kraemer* are directly applicable to this proceeding and the convictions should accordingly be reversed and set aside.

## POINT II

**Evidence adduced at the trial was not such as to sustain a conviction under the United States Constitution.**

This Court has historically sought to find interpretations which uphold the constitutionality of statutes. We suggest that the Court below in affirming the convictions of petitioners, so read the statute involved here as to require that it be found unconstitutional. For, in affirming the convictions the Supreme Court of Louisiana implicitly deter-

mined that the legislature authorized in advance and supported, private acts of discrimination.

The Louisiana statute is entitled "Criminal Mischief." In applying the facts of the instant case to that statute, it is patent from the record that no criminal mischief was in fact involved; petitioners were quiet and orderly, no evidence of any disorder by them or any others in the premises was even offered. Solely because three of the petitioners were Negroes, a lunch counter, maintained by the McCrory chain, was closed at an unusual time so as to avoid serving petitioners at a "whites only" counter. No reason was given for this action by the McCrory store other than the skin color of some of petitioners.

No reference appears in a reading of the statute, as the Court below noted, to support segregation violative of the Constitution; accordingly none should be assumed. But, the interpretation of the lower Courts, say in effect, that the Louisiana Legislature authorized acts which were beyond its competence under the Fourteenth Amendment, namely the commission of acts of discrimination against negroes.

If the state cannot commit acts of discrimination under the equal protection clause of the Fourteenth Amendment, how can it then authorize by statute the commission of such acts? We are not concerned here with a mere private right of private persons, but an affirmative act of legislation which the Court below would have us believe authorized the acts of discrimination.

Petitioners were arrested at a "white" counter. Certainly, Louisiana could not enact legislation directly making criminal the acts of petitioners here; it could not say that

negroes had no right to sit at the lunch counter in question. The Court below would have us believe, however, that despite this limitation, the Legislature could and did authorize and support by criminal penalties a subterfuge to do this very act.

This Court has ruled on several occasions that legislation enacted to maintain segregation is unconstitutional. This is so whether it is in a public facility or involves a private activity. *Barton v. Wilmington Parking Authority*, 365 U. S. 721.

If the Court below is correct, this Court is being urged to permit subterfuge to justify and uphold the performance of activity which clearly is otherwise illegal. For whether by legislation that says "no negroes may sit at white lunch counters", or by interpreting a statute so as to cause it to read *as if* it said that, the result is exactly the same, segregation is maintained and persons are convicted of committing a crime, without engaging in any act other than sitting peacefully at a lunch counter.

We suggest that the improper interpretation of the statute of the Court below requires a setting aside of the convictions herein on the grounds that there is nothing in the legislation in question which authorized the convictions or their affirmance.

The often-quoted language in *Fick Wo v. Hopkins*, 118 U. S. 356, 373, 374 is particularly apropos here:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial

of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson v. Mayor etc. of New York*, 92 U. S. 259 (Bk. 23, L. ed. 543); *Chy Luny v. Freeman*, 92 U. S. 275 (Bk. 23, L. ed. 550); *Ex parte Va.* 100 U. S. 339 (Bk. 25, L. ed. 676); *Neal v. Delaware*, 103 U. S. 370 (Bk. 26, L. ed. 267); and *Soon Hing v. Crowley (supra)*."

La. R. S. 14:59(6), even if it is constitutional, has been arbitrarily, capriciously and discriminatorily applied and administered unjustly and illegally, and only against persons of the Negro race or white persons acting with members of the Negro race. Such unequal application of the law cannot be excused by a pretense that the law, as written, does not require unequal treatment.

### POINT III

**The use of the public force to protect property is limited by the equal protection clause of the Fourteenth Amendment.**

The Fourteenth and Fifth Amendments protect private property so that it may not be taken without due process of law. In them, limitation is set on the exercise of both the federal and state power.

Much has been written as to the nature and philosophy of property and possession. Justice Oliver Wendell Holmes in the chapter on possession in his renowned volume on the *COMMON LAW* and Professor Morris R. Cohen in *LAW AND THE SOCIAL ORDER* are amongst our finest commentators as to the nature of property and its limited uses.

Professor Cohen in the essay on property in **LAW AND THE SOCIAL ORDER** discusses property as being a legal right granted to an individual to exclude others from its use.

Justice Holmes at page 214 of the 45th edition to the **COMMON LAW** stated it in these terms. "A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution or compensation by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right . . ."

McCrory's, possessing the legal right to the use of property, chose voluntarily to open its property at busy Canal and Burgundy Streets to the public for the sale of numerous kinds of goods and services. It could have excluded, by virtue of its right, all persons from that property; it chose rather to put it to a business use. Now it calls upon the public force to aid it in effectuating an admitted act of discrimination and segregation, an act which if committed by the state directly would clearly violate the Fourteenth Amendment. *Burton v. Wilmington Parking Authority, supra.*

At this point the issue is not whether private acts of discrimination violate the Fourteenth Amendment, but whether the public force may be used to maintain and support acts of segregation. Certainly the public force may not directly impose segregation and many cases to that effect have been decided by this Court. Then wherein lies the difference, unless we presume a blind and deaf public power.

The Court in *Shelley v. Kraemer* stated at page 22, "The Constitution confers upon no individual the right to

demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."

In this case the issue is not whether McCrory's must or must not serve petitioners, not whether they may or may not select clientele, but whether or not they may ask the public force to assist them in a refusal to serve persons based upon their color. As we perceive it, the issue is not the private right of McCrory's, but the use of the public force "which results in the denial of equal protection of the laws to other individuals."

Justice Holmes stated that the legal right resulting from the possession of property bears the related right to call upon the public force; but the use of that force is limited by the restrictions of the Fourteenth Amendment and the equal protection clause. This is a reasonable inference to be drawn from the statement from *Shelley v. Kraemer, supra*, quoted above.

There is no neutral protection of property rights in such a matter as before this Court. We are not concerned with the traditional duty of the police to maintain order, to protect people in their homes or to direct the flow of traffic. This property located at Canal and Burgundy Streets in the heart of downtown New Orleans was no person's home, nor was there any showing of any public disorder. The only untoward act occurred with the closing of the lunch counter at 10:30 A. M. by the manager of the department due to the presence of Negroes.

Pretense, sham and subterfuge do not create respect for the law, and do not obtain compliance with the law. To pretend the police merely protected a property right, one must pretend that no more was involved in the arrest of petitioners. Laws must be based on honesty and reality, not deception and inequality. Property rights were not the subject of protection by the police though the pretense was such, but rather the unequal, immoral, degrading institution of segregation was the beneficiary of the law's bounty.

It is no derogation of the right of private property to say it cannot call upon the public force to protect it from a use in violation of the United States Constitution. In many ways the uses of private property are limited. For example, zoning ordinances clearly limit the freedom of use of property.

In Louisiana, Civil Code Articles expressly limit property rights, as for example:

Article 490. Ownership is divided into perfect and imperfect. . . .

Article 491. Perfect ownership gives the right to use, to enjoy and to dispose of one's property in the most unlimited manner, provided it is not used in any way prohibited by laws or ordinances. . . .

Article 667. Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him.

We respectfully urge as the Court stated in *Shelley v. Kraemer (supra)*, that a private owner cannot call upon



the public force to maintain an inequality in the protection of the laws; similarly it is violative of the Fourteenth Amendment for the public force to respond in support of such improper call. Accordingly, we urge the setting aside of the convictions for this reason.

#### POINT IV

**The Constitutional right of petitioners freely to assert opposition to segregation is a right that should have been protected by the State in the case at bar.**

Petitioners' presence at the lunch counter was a form of expression, a means of communication; in the broad sense, it was "speech."

"Speech" protected by the United States Constitution includes modes of expression other than by voice or by press. *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, *Thornhill v. Alabama*, 310 U. S. 88, 106.

Petitioners' act in sitting quietly in a place of business, for the purpose of expressing disapproval of a policy of racial discrimination practiced there constituted a form of speech. As such, it is protected against interference by the State.

"The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state." *Schneider v. State*, 308 U. S. 147.

When agents of the state (police officers, the District Attorney, the District Judge) arrested, charged and tried

petitioners under La. R. S. 14:59(6), thereby preventing them from continuing their expression of disapproval of racial discrimination by the management of the lunch counter, the state deprived them of an element of liberty guaranteed to them under the Fourteenth Amendment against such state action.

Hence, even if it be conceded *arguendo* that the statute might be constitutionally enforced in other circumstances, it may not be so when its enforcement limits a form of communication of ideas, as has been done in the present instance. Rather than being arrested for their expression of opinion, petitioners had a right to expect police protection to preserve order. *Sellers v. Johnson*, 163 F. 2d 877 (8th Cir.) *cert. denied*, 332 U. S. 851.

Complex as our society is, it is inevitable that various interests will come into conflict. It is not unusual for this Honorable Court to consider a right such as free speech weighed against other rights. *Schneider v. State*, 308 U. S. 147; *Thomas v. Collins*, 323 U. S. 516.

Freedom of speech was inhibited by the state herein. It can hardly be denied that the act of petitioners was an act of speech, asserting the right of equality for all citizens, black or white. The act of the state in limiting this assertion must be examined by the Court to see what interest of the state needed protection to warrant the interference with speech. *W. Va. State Bd. of Education v. Barnette*, 319 U. S. 624, 639.

There was no imminent danger to the state which required protection, and which demanded the limitation of speech. *Thornhill v. Ala., supra*. In passing the statute

under which petitioners were charged, there was no substantive evil threatened requiring the denial of the right to peaceful, free assertion or speech. *Schenck v. U. S.*, 249 U. S. 47.

It has always been the view that rights under the First Amendment (and protected from infringement by the state under the Fourteenth) are preferred rights, and the usual presumption in favor of validity of legislation is not present with respect to laws limiting such rights. *Thomas v. Collins*, 313 U. S. 516; *Schneider v. State*, 308 U. S. 147.

No right of the state at all is alleged; at most, merely the right to refuse service to Negroes by privately owned storekeepers is involved. Not only was no disorder shown to have existed, no assertion of any loss to McCrory's was made. Weighed against the peaceful exercise of speech by petitioners is an act of discrimination not only immoral in itself, but legally de minimis, and almost frivolous as compared with the right of protest against such discrimination.

The state was not presented with a street brawl where its duty would be to maintain order neutrally, but rather with two assertions of right. However it acted, one right or the other had to be subordinated. When such are the conditions, the choice must support the highly protected Constitutional right of freedom of speech.

## POINT V

**Restaurants are a business affected with a public interest wherein segregation may not be enforced.**

In *Garner v. Louisiana*, 368 U. S. 157, Mr. Justice Douglas, in his concurring opinion, pointed out that Louisiana restaurants are required to have a license. La. R. S. 47:353, 362. Local Boards of Health may provide means for public health. La. R. S. 40:32, 35. Ordinances of the City of New Orleans include the requirement that persons selling food must have a permit. New Orleans City Code, 1956, §29-55, 56. Thus the State has more than a casual concern in such matters in order to protect the public interest.

Whatever the issues are in other businesses, the state has shown its special interest in restaurants by licensing them. Almost by definition this becomes a business affected with a public interest.

"The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it (*Marsh v. Alabama*, 326 U. S. 501).

With McCrory's open to the public in the manner it is, we urge that it has become so affected with a public interest as to require the application of the Fourteenth Amendment.

Nor can the protections of that Amendment be by-passed by resort to charging some members of the public with trespass when they enter the open doors of such an establishment. The concept of trespass in a publicly

licensed business operated in the open manner in which this store functions is almost self-contradictory.

The absurdity of the idea of trespass by these petitioners becomes more apparent when we examine the testimony and find that Negroes are welcomed at all counters but the one in question.

Since the events herein took place in a publicly licensed restaurant opened to the public at large, the acts of discrimination were committed by a business affected with a public interest; such being the case the limitations and obligations of the Fourteenth Amendment apply (*Marsh v. Ala., supra*), and the convictions should be reversed as a denial of equal protection.

## POINT VI

**Refusal by trial judge to admit evidence to establish actual concert between McCrory's and the police violated petitioners' right to a fair and impartial trial as guaranteed by the Fourteenth Amendment.**

The refusal of the trial judge to admit testimony showing actual concert between the store proprietor and the police violated petitioners' right to due process of law guaranteed by the Fourteenth Amendment (R. 22-25).

The expression of policy by the Mayor and the Superintendent of Police of the City of New Orleans (R. 138-9) operated as a warning to all members of the Negro race not to seek service at lunch counters whether or not the proprietor was willing to serve them. The pronouncement of policy by the leaders of the municipal authority operated also as notice to proprietors of business establishments not

to serve Negroes at "white" counters at the risk of suffering municipal censure or punishment.

Under the *Civil Rights* cases, *supra*, to show state participation it was important that defendants prove concert between the store manager and the police. This was relevant evidence, the exclusion of which was prejudicial to the petitioners as it limited their right to show that they were the victims of prohibited state action rather than of a protected personal act of the proprietor.

### Conclusion

For all of the reasons set forth above, we respectfully urge that the convictions of petitioners, and the affirmance thereof, be reversed and set aside.

Respectfully submitted,

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1962.

**RUDOLPH LOMBARD, ET AL.,**

**PETITIONERS**

*v.*

**STATE OF LOUISIANA,**

**RESPONDENT**

**ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF LOUISIANA**

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**RESPONDENT**

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**ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF LOUISIANA**

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**Brief on behalf of the State of Louisiana**

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*May it Please the Court:*

**STATEMENT OF THE CASE**

The facts surrounding the sit-in demonstration which is the basis of the criminal mischief charge brought against these defendants by the State of Louisiana are given in detail in the opinion of the Supreme Court of Louisiana in this case, *State v. Goldfinch*, 241 La. 958, 132 So.2d 860 (1961).

Between ten and eleven o'clock on the morning of September 17, 1960, two Negro men, a Negro woman, and a white man—the four defendants in this proceeding—took seats at a 24-stool lunch counter re-

Rudolph Joseph Lombard, a student at Xavier University; Cecil Winston Carter, a student at Dillard University; Sydney Langston Goldfinch, Jr., a student at Tulane University; and Oretha Maureen Castle, a student at Southern University—all located in New Orleans.

served for white customers' in one of McCrory's Five and Ten Cent Stores, located at 1005 Canal Street in New Orleans. R. 103-105.

McCrory's is one of a national chain of stores operating in 34 states, McCrory Stores, Inc. R. 19, 119. It sells a variety of merchandise and is open to the general public. R. 19. The question of whether the lunch counter facilities in the various McCrory stores are segregated or integrated is left by the national office of McCrory Stores, Inc., to be determined by local tradition, law and custom, as interpreted by the manager of each individual store. R. 21.

The McCrory's store in which these defendants staged their sit-in demonstration had had separate counters for serving food to Negro and white customers since 1938, R. 110. There is no Louisiana law nor New Orleans ordinance requiring segregation in public eating places, and by operating separate lunch counters for whites and Negroes McCrory's was simply following local custom.

An employee of the lunch counter at which defendants sat down called the restaurant manager, who informed the students that he could not serve them there, that he had to sell to them at the rear of the store where he had a colored counter. R. 104-105. When the manager received no answer from the sit-ins he turned off the lights, removed the unoccupied stools and closed the counter. R. 105, 133-135. A sign read-

"There are five eating places in the store: a main restaurant that seats 210; a counter for Negroes that seats 53; a white refreshment bar that seats 24; and two stand-up counters. R. 104.



ing "this counter is closed" was pointed out to the students but they remained seated, in silence. R. 105. The restaurant manager then called the store manager and the police. R.105-107. Prior to the arrival of the police the store manager went behind the counter at which defendants were sitting and asked them to leave, but they neither answered him nor moved. R.113.

When the police arrived the store manager advised the students, in the presence of the police, that the counter at which they were sitting was closed, and asked them to leave the store. R.122, 126-127. Nothing happened. Thereupon the police officers ordered defendants to move, and when they failed to do so, arrested them and charged them with criminal mischief. R.129, 6; R.S. 14:59.

Pertinently, under paragraph (6) of Article 59 of the Louisiana Criminal Code, R.S. 14:59 (6), criminal mischief is the intentional performance of the following act: "Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

Defendants were tried and found guilty of criminal mischief. R. 139. The Louisiana Supreme Court affirmed their convictions. *State v. Goldfinch*, 241 La. 958, 132 So.2d 860. They applied to this Honorable Court for a writ of certiorari, which was granted on June 25, 1962. 370 U.S. 935.

## ARGUMENT.

### I

**The Fourteenth Amendment to the Constitution of the United States applies only to state action.**

The first section of the Fourteenth Amendment to the United States Constitution provides pertinently that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In order to enforce by appropriate legislation what it thought to be the provisions of the Fourteenth Amendment, Congress passed the Civil Rights Act of 1875, prohibiting, among other things, certain private racially discriminatory action. In the famous *Civil Rights Cases*, 109 U.S. 3, however, the sections of the act dealing with discriminatory action by the proprietors of inns, theaters, etc., were held by this Court to be unauthorized by the Fourteenth Amendment (and

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18 Stat. 335, the first section of which provided "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Section 2 stated that anyone who violated Section 1 would have to pay the person aggrieved \$500 and could be convicted of a misdemeanor.

also by the Thirteenth) and hence to be unconstitutional and void. The various civil rights cases before the Court involved indictments of persons who had denied to Negroes the accommodations of a hotel, a theater, and a railroad car. In discussing the scope of the first section of the Fourteenth Amendment in the *Civil Rights Cases* this Court relied on three of its earlier decisions dealing with this amendment (*United States v. Cruikshank*, 92 U.S. 542; *Virginia v. Rives*, 100 U.S. 313; *Ex Parte Virginia*, 100 U.S. 339) and said:

"It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. . . . It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. . . . to provide

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'After the federal Civil Rights Act was held unconstitutional by this Court in the *Civil Rights Cases* many of the states passed civil rights acts by virtue of their police power, as did Congress for the District of Columbia. See *District of Columbia v. Thompson*, 346 U. S. 100; *Fletcher v. Coney Island*, 136 N.E. 2d 344 (Ohio App. 1955); Emerson and Haber, *Political and Civil Rights in the United States*, v. 2, p. 1406 (2d ed. 1958):

modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges. . . .”

Further on in the *Civil Rights* opinion this Court repeated its conclusion that only the positive acts of a state were the subject matter of the Fourteenth Amendment, saying:

“ . . . until some State law has been passed, or some State action, through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment . . . can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority.”

And in the more recent case of *Shelley v. Kraemer*, 334 U.S. 1, Mr. Chief Justice Vinson said for the Court:

“Since the decision of this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.”

It is submitted that this Court's interpretation

of the first section of the Fourteenth Amendment as being a limitation on state action only is eminently correct. The phrasing of this part of the amendment ("No State shall make or enforce any law . . .; nor shall any State deprive any person . . .; nor deny to any person . . .") allows no other interpretation.

Under the above jurisprudence it is clear that the defendants in the instant case, denied equal eating privileges with white customers, could have looked to the Fourteenth Amendment for help in having their convictions for criminal mischief set aside only had state action brought about the denial.

There being no Louisiana law nor New Orleans ordinance requiring segregation of the races in restaurants, it is evident that there are only two possible sources for the requisite state action in the sit-in demonstration which formed the basis of this prosecution: either 1) the action of McCrory's itself in discriminating against the defendants on the basis of race, or 2) the action of the New Orleans Police and of the state courts in arresting and criminally prosecuting the defendants for criminal mischief when they refused to leave McCrory's at the request of the local manager.

It is the position of the State of Louisiana in this proceeding that neither the action of McCrory's nor the action of the city police and state courts was state action within the meaning of the Fourteenth Amendment and that hence the amendment is not applicable here.

## II

**The Concept of State Action**

Ministerial acts of the state judiciary and acts of the state executive and legislature are state acts for the purposes of the Fourteenth Amendment, *Ex parte Virginia*, 100 U.S. 339; *Strauder v. West Virginia*, 100 U.S. 303. This is also true of the acts of state boards, *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20; of municipalities, *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278; of state courts construing state law, *Twining v. New Jersey*, 211 U.S. 78; and of public facilities, *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877 (public beaches maintained by public authorities of state and city); *Holmes v. City of Atlanta*, 350 U.S. 879 (golf courses provided and maintained by city); *New Orleans City Park Improvement Ass'n. v. Detiege*, 358 U.S. 54 (city park).

For a general discussion of this subject, see Lewis, *The Meaning of State Action*, 60 Col. L. Rev. 1083 (1960); Schwelb, *The Sit-in Demonstration: Criminal Trespass or Constitutional Right?*, 36 N.Y.U.L. Rev. 779 (1961); Van Alstyne and Karst, *State Action*, 14 Stanford L. Rev. 3 (1961); Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 Cornell L.Q. 375 (1958); Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 Duke L.J. 315, 350; Wollett, *Race Relations*, 21 La. L. Rev. 85 (1960); Dennis, *State Involvement in Private Discrimination Under the Fourteenth Amendment*, 21 La. L. Rev. 433 (1961); Losos, *The Impact of the Fourteenth Amendment on Private Law*, 6 St. Louis U.L.J. 368 (1961).



Also found to be state acts are those of state officials, even when the official's act not only is not a part of his statutory duty, but is prohibited by state law. *Screws v. United States*, 325 U.S. 91. Furthermore, the state's lessee acts for the state in operating a public facility such as a municipal swimming pool, *Lawrence v. Hancock*, 76 F. Supp. 1004 (D.C. W. Va. 1948), and also in operating a private business such as a restaurant, *Burton v. Wilmington Pkg. Auth.* 365 U.S. 715.

The action of some private organizations has been held to be state action if the private organization performs a governmental function, conducts the public's business under a franchise, or is financed and controlled by the state or by one of its subdivisions. Thus a private political organization controlling the state election procedure has been treated as a state agency for purposes of the Fourteenth Amendment. *Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; *Smith v. Allwright*, 321 U.S. 649; *Terry v. Adams*, 345 U.S. 461. The action of the directors of a testamentary trust administered by the City of Philadelphia was found to be state action. *Pennsylvania v. Board of Trusts*, 353 U.S. 230. Similarly, the acts of a privately endowed and operated library which received substantial financial and administrative aid from the city in which it was located have been characterized as state action. *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F. 2d 212 (4 cir. 1945). And the acts of a public utility operating for the



benefit of the public pursuant to a franchise issued to it by the city are the acts of the state and not those of an ordinary business corporation. *Boman v. Birmingham Transit Company*, 280 F. 2d 531 (5 cir. 1960).

Two cases in this area of state action deserve special comment: *Marsh v. Alabama*, 326 U.S. 501, and *Shelley v. Kraemer*, 334 U.S. 1.

In *Marsh v. Alabama*, decided in 1946, a Jehovah's Witness was arrested under an Alabama trespass law for distributing religious literature on the streets of a company-owned town. The town, a suburb of Mobile known as Chickasaw, was owned by the Gulf Shipbuilding Corporation; otherwise it had all of the characteristics of any other American town—residential buildings, streets, a system of sewers, a shopping center, a post office. The Jehovah's Witness was convicted of trespass by the Alabama courts because she entered and remained on the company's property after having been warned by the company not to do so. Relying on the First and Fourteenth Amendments to the United States Constitution she appealed to this Court, which set aside her conviction on the ground that no town, even a privately owned one, could by ordinance, or as here by company rule, bar the distribution of religious or political literature on its streets, sidewalks or public places, or make the right to distribute that literature dependent upon the whim of an official. The people who lived in or came to Chickasaw, this Court said, could not be denied freedom of press and of reli-

gion simply because a single company had legal title to all of the town. The owner of the town was classified with the owners of privately held bridges, ferries, turnpikes and railroads, which cannot be operated as freely as a farmer does his farm. "Since these facilities are built and operated primarily to benefit the public", this Court said, "and since their operation is essentially a public function, it is subject to state regulation." In other words, because the company-owned town functioned just like any other municipality, this Court treated it as a municipality, and in effect held its action to be state action.

In *Shelley v. Kraemer*, decided two years later in 1948, this Court held that the enforcement by a Missouri court of a restrictive covenant, having as its purpose the exclusion of Negroes from the ownership or occupancy of real property throughout an entire neighborhood in St. Louis, was state action which violated the Fourteenth Amendment. In 1911 thirty out of a total of thirty-nine owners of property in that city fronting both sides of one street had signed an agreement barring sale of any property within the above boundaries to Negroes for a period of fifty years. The entire district described in the agreement included fifty-seven parcels of land, of which the thirty owners who signed the agreement owned forty-seven parcels. In 1945 the owner of one of the parcels of land included in the agreement nevertheless sold his property to a Negro, Shelley, and owners of other parcels subject to the restrictive agreement sued to set aside the

sale to Shelley. Shelley defended on the ground that judicial enforcement of the agreement, barring sale to him because of his race, violated rights guaranteed to him by the Fourteenth Amendment. The Supreme Court of Missouri upheld the agreement, thus denying title to Shelley.

This Court granted certiorari and set aside the judgment of the Missouri Supreme Court on the ground that the action of the Missouri court in enforcing the terms of the restrictive covenant was state action prohibited by the Fourteenth Amendment. Among the civil rights protected from discriminatory state action by that amendment, this Court pointed out its opinion in *Shelley*, is the right to acquire and dispose of property, specifically reserved to every American citizen by section 1978 of the Revised Statutes, 42 U.S.C. 1982, and therefore no state nor municipality can by statute or ordinance prevent Negroes, *qua* Negroes, from buying property in a specified locality. See *Buchanan v. Warley*, 245 U.S. 60. As long as the refusal to sell property to Negroes was based on the voluntary choice of the St. Louis property owners, the *Shelley* opinion continued, no state action, and hence no violation of the Fourteenth Amendment, was involved, but when one of the property owners who signed the restrictive agreement changed his mind and sold his land to a Negro, the subsequent setting aside of the sale by the Missouri court was state action which deprived both the vendor and the vendee of the right to buy and sell property without regard to race, contrary to the Fourteenth Amendment.

## III

**McCrory's Action Was Not State Action**

1. *The action of McCrory's in the instant case in refusing to serve these defendants at its white lunch counter was private action, not state action.*

No argument is needed to show that McCrory's Five and Ten Cents Store is not an official, an agency, a subdivision, a lessee, a board, or a public facility of the State of Louisiana. McCrory's store, where the sit-in demonstration by these defendants took place, is a segment of a large private enterprise devoted to the purpose of making money for its owners. This private organization performs no governmental function such as that performed by a private political organization which controls the state election procedure (see *Nixon v. Condon*, etc., *supra*); it is not financed or administered, even partially, by either the City of New Orleans or the State of Louisiana (see *Kerr v. Enoch Pratt Free Library*, *supra*); and it does not have a franchise to operate in New Orleans for the benefit of the public (see *Boman v. Birmingham Transit Company*, *supra*).

2. *Marsh v. Alabama*

Nor is this Court's decision in *Marsh v. Alabama*,

"The State of Louisiana takes issue with the view expressed by Mr. Justice Douglas in his concurring opinion in *Garner v. Louisiana*, 368 U.S. 157, 176, that those who run a retail establishment in Louisiana operate a public facility because they are required by the State Sanitary Code, promulgated by the Louisiana Board of Health under R.S. 40:1-11, to obtain a public health permit from the Board of Health if they sell food. See *infra*.

326 U.S. 501. helpful to these defendants. It is true that the owners of McCrory's, for their own advantage (like the owner of Chickasaw), opened their property up to the public in general, but no more so than do most other private retail businesses in this country. The crux of this Court's decision in *Marsh* is that the company town involved there was exactly like any other town in the United States, and was for this reason limited by the provisions of the Fourteenth Amendment in regard to freedom of expression on its streets—just like any other town. In the instant case McCrory's is a privately owned store, and its owners have the same rights as those enjoyed by any other private shopkeeper in America in the absence of a state civil rights act—i.e., the right to refuse to serve any customer at any time for any reason, however arbitrary that reason might be. *Terminal Taxicab Co. v. Dist. of Col.*, 241 U.S. 252.

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<sup>1</sup>Although the Louisiana Constitution of 1868, generally referred to as the Carpet Bag Constitution (*Saint v. Allen*, 169 La. 1046, 126 So. 548) provided in Art. 13 that all persons should enjoy equal rights and privileges in all public conveyances and places of a public character, without discrimination on account of race or color (see *Joseph v. Bidwell*, 28 La. Ann. 382), this provision was omitted in the later Louisiana Constitutions of 1879, 1898, 1913 and 1921. Furthermore, Sections 458, 1699 and 1700 of the Louisiana Revised Statutes of 1870—the civil rights laws implementing the 1868 constitutional provision—lay dormant for decades and were officially repealed in 1954. See R.S. 4:3, 4. Therefore Louisiana is presently one of the approximately 25 states in this country which do not have a civil rights act. For the states which do have public accommodations statutes, see Greenberg, *Race Relations and American Law*, p. 375 (1959).

3. *A business open to the public is not ipso facto the state.*

As this Court pointed out in *Terminal Taxicab Co. v. Dist. of Col.*, supra, it is true that all business, and for that matter every life in all of its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. The mere fact that a business has a public aspect, however, does not mean that it is indistinguishable from the holder of a franchise and that it therefore acts for the state.

A state grants to a private corporation an exclusive right or franchise to perform a public utility service such as furnishing gas, electricity, transportation, etc., to the inhabitants of a city because the grantee is performing the public's business, doing something which the state deems to be required for the public necessity or convenience. See *Roman v. Birmingham Transit Company*, 280 F2d 531. It is logical, therefore, to say that the holder of a franchise acts for the state, because in fact it does. However, the majority of businesses in this country act not for the state, nor for the public, but for their private owners. It is true that since the decisions of this Court in *Munn v. Illinois* 94 U.S. 113, and *Nebbia v. New York*, 291 U.S. 502, the state has the right to regulate all business for the public good, and not just those businesses which are public utilities or have a franchise from the state, and does not by this regulation offend the due process clause of the Fourteenth Amendment sought to be used as a shield by business—but this is a far cry from saying that private business open to the pub-



lic in order to make a profit for its owners is indistinguishable from a public utility for the purposes of discriminatory state action under the equal protection clause of the Fourteenth Amendment.

4. *Defendants are not being deprived of any legal or constitutional right.*

Another feature distinguishing the instant case from *Marsh* is that in *Marsh* the accused was deprived of her right to freedom of expression, whereas in the instant matter the defendants were not deprived of any legal or constitutional right at all. Nothing in the Federal Constitution guarantees to the citizen of a state the inalienable right to be served in any store or restaurant he might choose to enter. Further, McCrory's lunch counter is not within the scope of Sec. 216 (d) of Part II of the Interstate Commerce Act, 49 U.S.C. Sec. 316 (d), see *Boynton v. Virginia*, 364 U.S. 454, nor of any other similar federal act as far as we have been able to discover. Nor, as we have pointed out previously, does Louisiana have a civil rights act.

Although at common law innkeepers and public conveyances had a duty to serve all who applied to them, see 10 Am. Jur. 909, storekeepers did not. *Terminal Taxicab Co. v. Dist. of Col.*, supra. In about one-half of the states in this country at the present time a citizen has the right to be served at any lunch counter at which he might sit, regardless of his color, religion or race, but this is solely because these states have under their police power passed a civil rights act, or



some type of public accommodations law. See Greenberg, *Race Relations and American Law*, p. 375-379 (1959); Emerson and Haber, *Political and Civil Rights in the United States*, v. 2, p. 1405-1422 (2d ed. 1958).

The basis of this Court's decisions in *Boynton v. Commonwealth of Virginia*, 364 U.S. 454, and *Burton v. Wilmington Parking Authority*, 365 U.S. 715—both involving Negroes attempting to be served in restaurants catering exclusively to whites—is not that the customer in either case had a constitutional right to be served, but rather 1) that in *Boynton* the Negro customer had a federal right to be in the bus terminal restaurant because of the Interstate Commerce Act, which in Sec. 216 (d) of Part II forbids any interstate common carrier by motor vehicle to subject any person to unjust discrimination, and 2) that in *Burton* the restaurant owner, as the state's lessee, had to comply with the proscriptions of the Fourteenth Amendment.

Inasmuch as McCrory's is not a lessee of the state, as its lunch counter is not regulated by Sec. 216 (d) of Part II of the Interstate Commerce Act, and as Louisiana has no civil rights act, what enforceable right did these defendants have to demand to be served at that lunch counter in McCrory's store?

##### 5. *Freedom of expression*

Furthermore, if defendants' action in remaining silently seated at the lunch counter, after being asked by the store manager to leave the counter and the store, R. 113, 122-127, is viewed as a form of expres-

sion condemning segregated lunch counters, similar to picketing, defendants nevertheless had no right under the First Amendment to remain seated on McCrory's stools after being told that they would not be served at that counter, thus keeping other customers away by illegally occupying McCrory's property, as in a sit-down strike.

Although the First Amendment to the United States Constitution protects freedom of expression in all of its many forms, the method of expression must be a legal one. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490. In *Labor Board v. Fansteel Corp.*, 306 U.S. 240, this Court held that seizure of Fansteel's two key buildings by striking workers\* to prevent their use by the employer in a lawful manner and to compel the employer by force to submit to their demands was an illegal act on the part of the workers and as such punishable by loss of the right to job reinstatement after the strike ended. The opinion in *Fansteel* reveals that the sit-down strikers were forcibly removed from the buildings by the sheriff and his men and that they were subsequently fined and imprisoned for refusing to leave the building. The First Amendment protects peaceful picketing, *American Federation of Labor v. Swing*, 312 U.S. 321, but not seizure of the offending party's property.

In the instant case defendants could have pro-

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\*Who apparently entered the buildings with the permission of the owner, but stayed on as strikers after stopping work.

tested McCrory's segregated lunch counters by parading the sidewalk in front of the store carrying signs stating their objections. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552. By taking possession of a portion of McCrory's lunch counter, however, and by refusing to leave the counter and the store when asked to do so by the management, they violated Louisiana's criminal mischief statute, Article 59, paragraph 6, of the Louisiana Criminal Code, R.S. 14:59 (6), and put themselves beyond the protection of the First Amendment.

In *Martin v. Struthers*, 319 U.S. 141, in striking down as a denial of the First Amendment right to freedom of speech a municipal ordinance forbidding the ringing of doorbells, etc., for the purpose of distributing handbills, this Court concluded that it should be left to each householder to decide whether he would receive such callers, and that a city could validly punish those who insisted on calling at a home in defiance of the previously expressed wish of the occupant not to be disturbed.

If a state can punish persons who summon a homeowner against his wishes in order to hand him religious literature, and not thereby violate the First Amendment guarantee of freedom of speech, it follows logically that a state can punish persons who stage a sit-in demonstration at a private lunch counter against the express wishes of the management without depriving those persons of any rights under the First Amendment.

6. *Garner v. Louisiana*

Under the reasoning of the concurring opinion of Mr. Justice Douglas in *Garner v. Louisiana*, 368 U.S. 157, 176, McCrory's action in refusing to serve these defendants because three of them were Negroes was not state action.

The *Garner* case is similar to the instant one in that it involved sit-in demonstrations at lunch counters in retail establishments similar to McCrory's.

## I

**Action of a private individual which is motivated by the custom of a locality is not state action under the decision of this Court in the Civil Rights Cases.**

It is true that this Court in its majority opinion in the *Civil Rights Cases* said:

"... civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, *unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings.*" (Emphasis added)

The word "custom" has several meanings,<sup>10</sup> one

"The two pertinent sit-ins in *Garner* took place at Kress' Department Store and Sitman's Drug Store in Baton Rouge, Louisiana.

<sup>10</sup>See Webster's Third New International Dictionary (1961). Article 3 of the Louisiana Civil Code states that customs result from a long series of actions constantly repeated which have acquired the force of a tacit and common consent. They are useful in construing contracts, especially ambiguous ones. See Art. 1953, La. Civ. Code.

of them being synonymous with law because in various places and at various times, especially in societies in the early stages of civilization, custom has been enforced by the state as law. This was particularly true, for example, in France and England. See Allen, *Law in the Making*, esp. Ch. I, Custom: Nature and Origin, and Ch. II, Custom: Interpretation and Application (6th ed. 1958); Pound, *Jurisprudence*, v. III, Ch. 16, Sources and Forms of Law (1959); Rodenbeck, *Anatomy of the Law*, p. 3 (1925) ("There are certain customs and usages according to which human relations are regulated which are not, necessarily, law. The humblest village custom, however, may be a law if enforced by the sovereign."); Pollock, *First Book of Jurisprudence*, Part II, Ch. IV, Custom in English Law (5th ed. 1923) ("Custom, as understood in law, is usage which hath obtained the force of law, and is in truth a binding law for the particular place, persons and things concerned." p. 281); Edmunds, *Law and Civilization*, Ch. 17, Nature and Sources of the Common Law (1959)

In Sir Frederick Pollock's *Jurisprudence and Legal Essays* (Goodhart ed., 1961) the following appears under the heading "The Nature and Meaning of Law" on pages 4-5:

"There has been much discussion about the relation of custom to law. Custom, except in distinctly technical applications which are really part of a developed legal system, seems to have no primary meaning beyond that of a rule or habit of action which is in fact used or observed . . . by some body or class

of persons, or even by one person. It was the 'custom' of Hamlet's father to sleep in his orchard of the afternoon. In the *Morte d'Arthur* we constantly read of a 'custom' peculiar to this or that knight; for example, Sir Dinadan had such a custom that he loved every good knight, and Sir Galahalt, 'the hault prince', had a custom that he would eat no fish . . . . No constant relation to law or judicial authority can be predicated of custom. It may or may not be treated as part of the law. Much law purports to be founded upon custom, and much custom has certainly become law."

The word "customs" as used by this Court in the *Civil Rights Cases* is obviously synonymous with laws, unwritten laws enforced by state courts like the common law. This Court could not have meant in that opinion that private individuals cannot discriminate against each other on the basis of race because of habit or usage, as that is just what the innkeeper, theater owner and railroad proprietor in the *Civil Rights Cases* were doing. Those owners of private businesses in the *Civil Rights Cases* refused to serve Negro customers who applied to them only because of custom, used in its nonlegal sense, just as McCrory's did in the instant matter. If this Court had been of the opinion in 1883 that individual action based on personal habit or community usage is state action, then it would have held the Civil Rights Act of 1875 to be constitutional, on the ground that it was aimed at state action and so authorized by the Fourteenth Amendment.



*Baldwin v. Morgan*, 287 F.2d 750 (5 cir. 1961), cited in Mr. Justice Douglas' concurring opinion in *Garner*, is an apt illustration of an instance in which state policy may be expressed in custom in a manner reprehensible to the Fourteenth Amendment, but that case is easily distinguishable from the one presently before this Court. In *Baldwin*, the segregation of races was enforced in the Railroad Terminal Station at Birmingham at the instigation of the Alabama Public Service Commission. In other words, an agency of the state was enforcing a policy of segregation in a terminal owned by several railroads, similar to, if not identical with, a public utility. The crucial difference between *Baldwin* and the instant case is that in *Baldwin* the state itself was doing the segregating on the basis of custom, on what amounted to state property, whereas in the proceeding presently before this Court the manager of a private business was doing the segregating, on the basis of custom, on private property. In the *Baldwin* case the state through the public service commission and the owners of the terminal could not segregate on the basis of race for *any* reason—law, custom or whim—whereas in the instant case the private owner could segregate on the basis of race for *any* reason personal to himself, including voluntary adherence to custom.

If the action of any private citizen acting in voluntary accordance with local custom *ipso facto* becomes state action, why has it been necessary for approximately one-half of our states, not to mention the Dis-



trict of Columbia, to enact civil rights acts to protect their citizens from discrimination based on race or religion in public places? See *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28; *District of Columbia v. Thompson Co.*, 346 U.S. 100. All discrimination of this kind is based on custom of either an individual, a class, or a locality.

Therefore, it is only when a custom of racial segregation is enforced by a state court as state law, or when a state agency itself discriminates on the basis of custom, as in *Baldwin v. Morgan*, supra, that state action proscribed by the Fourteenth Amendment is expressed in custom. The discrimination of a private person, even though it is motivated solely by custom and the desire to conform or to make money, is private action and so is outside of the scope of that amendment.

## II

### **A lunch counter in a retail establishment is not a public facility.**

In part II of his concurring opinion in *Garner* Mr. Justice Douglas reasons that "Those who run a retail establishment under permit from a municipality operate, in my view, a public facility in which there can be no more discrimination based on race than is constitutionally permissible in the more customary types of public facility." 368 U.S. 182-183.

It is conceded that under Louisiana law restaurants are a form of private property which affect the public health and hence are subject to regulation by

the state under its police power. It is well settled that this regulation does not violate the due process clause of the Fourteenth Amendment. *Nebbia v. New York* 291 U.S. 502.

Under the provisions of Art. 7.02 of the Sanitary Code promulgated by the State Board of Health, see R.S. 40:11, no person shall operate a public eating place of any kind in the State of Louisiana unless he has been issued a permit to operate by the health officer, and permits shall be issued only to persons whose establishments comply with the requirements of the Sanitary Code. Under Article 7.017 of that Code the term "health officer" means the health officer of a municipality, parish or health district.

Section 4-1202 (2) of the Home Rule Charter of the City of New Orleans provides that the Department of Health of the city shall enforce the State Sanitary Code. Section 29-56 of the Code of the City of New Orleans specifies that it shall be unlawful for any person to engage in the sale of foodstuffs within the city without having previously obtained a permit to conduct such business from the Department of Health (C.C.S., Ord. 2570, Sec. 2.) For this permit there is no charge.

As we have said, the action of a private corporation operating under an exclusive franchise from the state has been held to be state action for the purposes of the equal protection clause of the Fourteenth Amendment. *Roman v. Birmingham Transit Company*, 280 F. 2d 531. This is a logical classification, as a

franchise is an exclusive right granted by the state to a private corporation to carry on business of a public nature, such as the operation of a public utility, generally on public property. It is a right granted by the state to an individual or corporation to do something which the corporation or individual otherwise could not do, such as the right to use a street for a trolley track, or to erect on it poles for telephone or electric wires, or to use the area under the street for water or gas pipes. 23 Am. Jur. 713-746, Franchises.

On the other hand a permit, license or certificate issued by a state board of health or by a state board of barbers, dentists, medical examiners, etc., is simply a regulatory device by means of which the state government polices private businesses and professions in the state for the public good.

As was pointed out earlier herein, the mere fact that a state has the right under its police power to regulate all business for the public good, and not solely those businesses which are public utilities or have a franchise from the state, and does not by this regulation offend the due process clause of the Fourteenth Amendment, does not mean that *any* business open to the public which happens to be regulated by the state through the state board of health, etc., is indistinguishable from a public utility for the purposes of discriminatory state action under the equal protection clause of the Fourteenth Amendment.

The theory that the holder of a license or permit to operate from the state is a public facility and hence

acts for the state was rejected by implication by this Court in the *Civil Rights Cases*. This is one of the strong arguments advanced by Mr. Justice Harlan in his dissent in that case. 109 U.S. 26, 41-43. There Mr. Justice Harlan argued that the owners of a place of amusement, inn, etc., exercised a "quasi public employment" within the meaning of the Civil Rights Act of 1875 because they "are established and maintained under direct license of the law. The authority to establish and maintain them comes from the public. The colored race is a part of that public. The local government granting the license represents them as well as all other races within its jurisdiction. A license from the public to establish a place of public amusement, imports, in law, equality of right, at such places, among all the members of that public." For a state to issue a license to a place of amusement which discriminated against colored people was, Mr. Justice Harlan reasoned, a violation of the Thirteenth Amendment by the state.

Under the doctrine announced in *Munn v. Illinois*, he continued, places of public amusement conducted under the authority of the law are clothed with a public interest because used in a manner to make them of public consequence and to affect the community at large. "I am of the opinion," he stated, "that such discrimination practiced by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude the imposition of which Congress may prevent under its power, by ap-

appropriate legislation, to enforce the Thirteenth Amendment; and consequently, without reference to its enlarged power under the Fourteenth Amendment, the act of March 1, 1875, is not, in my judgment, repugnant to the Constitution." Dissenting opinion of Mr. Justice Harlan, *Civil Rights Cases*, 109, U.S. at page 43.

By refusing to adopt the argument of Mr. Justice Harlan in the *Civil Rights Cases* this Court rejected the reasoning advanced by Mr. Justice Douglas in his concurring opinion in *Garner*—i.e., that the private owner of a business open to the public, such as a place of amusement or a restaurant, who is required by a state to obtain a regulatory permit, violates the Fourteenth Amendment (and/or the Thirteenth Amendment) by discriminating against a would-be customer because of his race.

In the City of New Orleans, not only are all establishments selling food required to obtain a permit from the City Department of Health, see Art. IV of Ch. 29, Health and Sanitation, Code of the City of New Orleans, p. 363-365; but barbers must have a certificate of registration, R.S. 37:360; dentists must have a license, R.S. 37:762; registered nurses must have a license, R.S. 37:920; optometrists must have a certificate, R.S. 37:1052; physicians and surgeons must have a certificate, R.S. 37:1273—to mention only a very few of the many regulated businesses and professions.

If a restaurant is a segment of the state govern-

ment, or acts for the state, simply because it is open to the public and must obtain a permit from the local board of health, so, by the same reasoning, are all of the holders of permits, licenses, certificates, etc., who do business with the public. Under such an approach this country would have a national civil rights act far broader than that ever dreamed of by the Congress of 1875.

#### IV

#### **The action of the New Orleans Police and of the State Courts in arresting and convicting defendants is not prohibited state action under the Fourteenth Amendment.**

If in the instant case, to pose a hypothetical situation, the manager of McCrory's and other managers of New Orleans five and ten cent stores had mutually contracted among themselves to refuse to serve Negroes at integrated lunch counters; if, further, one of the managers had changed his store's policy and had opened his lunch counters to white and Negro alike on an equal basis; and, if, in the event of the foregoing, the Louisiana courts had allowed the store managers standing by their contract to recover damages from their more liberal confrere or to enjoin his integrating acts, then we would have state action in violation of the Fourteenth Amendment under the holding of *Shelley v. Kraemer*, 334 U.S. 1, because it would be the state discriminating and not the individual of his own free will.

Or if, to pose another hypothetical situation,

the manager of McCrory's on September 17, 1960—the date of the sit-in demonstration which gave rise to these proceedings, R. 103—had happened to be an ardent civil rights advocate who cared more about his principles than his profits, and he had told his employees to serve these defendants instead of asking them to leave the counter and the store, R. 113, 122, 126-127, but irate white customers had called the New Orleans Police, causing the arrest and conviction of defendants, for, say, disturbing the peace—here again we would have state action reprehensible to the Fourteenth Amendment because the store manager wanted to serve Negroes at his lunch counter alongside whites, but was prevented from doing so by the state.

But if the manager of McCrory's had the right to refuse to serve these defendants at one of his lunch counters, which we maintain he did, and if, as happened, they refused to leave the lunch counter after he had told them that he would not serve them there and had asked them to leave the counter and the store, R. 113-127—in this situation, which is the one which actually occurred, defendants' arrest by the New Orleans Police and conviction by the Louisiana courts for criminal mischief under Article 59 of the Louisiana Criminal Code, R.S. 14:59, cannot be held to be state action which offends the Fourteenth Amendment.

The state court in the present case is not enforcing a state law, written or unwritten, discriminating against Negroes, but rather is upholding the legal right of a private lunch counter owner to serve whom



he pleases. And if the lunch counter owner has the right not to serve a customer because of that customer's race or religion—which right he does have in the absence of a state civil rights act—then he has the incidental right to remove the would-be customer from his premises without undue force. See *Maronne v. Washington Jockey Club*, 227 U.S. 633. Unless the lunch counter owner also has the right to call the police to remove the offender for him, society is going to be faced with the problem of self-help in this area.

The actions of state police officers which have been found by this Court to be expressive of state policy violative of the Fourteenth Amendment have occurred when those police officers on their own initiative and acting on their own impulses have deprived a person in their custody of a federal right. In *Screws v. United States*, 325 U.S. 91, Sheriff Screws, a policeman and a deputy arrested Hall for theft, handcuffed him, and took him to the court house, where the three police officers beat him to death for alleged resistance and insulting language. See also *Catlette v. United States*, 132 F. 2d 902 (4 cir. 1943), in which a deputy sheriff compelled his prisoners to drink large quantities of castor oil, tied them with rope and forced them to march through the streets, and *United States v. Classic*, 313 U.S. 299, in which election officials who conducted a primary election willfully altered and falsely counted and certified the ballots. In *Monroe v. Pape*, 365 U.S. 167, Chicago police officers broke

into a Negro family's home without a search warrant and submitted the family to various indignities. In the instant case, defendants are not contending that they were in any way mistreated by the New Orleans Police after their arrest.

This Court has also found reprehensible to the Fourteenth Amendment judicial action which systematically excluded persons of Mexican descent from juries, *Hernandez v. Texas*, 347 U.S. 475; or denied the accused due process of law, *Powell v. Alabama*, 287 U.S. 45; or enforced state common law policy which deprived a citizen of a right guaranteed to him by the federal constitution, such as freedom of expression by peaceful picketing which is protected by the First Amendment, *American Federation of Labor v. Swing*, 312 U. S. 321, or the right to contract under 42 U.S.C., Sec. 1982, *Shelley v. Kraemer*, 334 U.S. 1.

The instant case, however, falls into none of the above categories. The Louisiana courts have enforced no state law depriving these defendants of a federal right. Their freedom of expression could not be exercised by their illegally seizing possession of McCrory's lunch counter stools, see *Labor Board v. Fansteel Corp.*, 306 U.S. 240, and the freedom to contract protected by 42 U.S.C. Sec. 1982<sup>11</sup> is only the freedom to be allowed to carry out a contract already entered

<sup>11</sup>42 U.S.C. Sec. 1982 provides that all citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to purchase, lease, sell, etc., real and personal property.

into with a willing seller, or the freedom to enter into a contract with a willing seller, see *Shelley v. Kraemer*, 334 U.S. 1, free from interference by state laws or courts. Under 42 U.S.C. Sec. 1982 there inheres in every citizen the right to make a contract concerning property with another willing party, but a contract by its very name implies two or more willing parties. There is no unilateral right of contract for any citizen in this country, white or black.

The decision of this Court in *Shelley* does not prevent the state from aiding private persons to implement their racial or religious prejudices if this prejudice is expressed in a legal manner; that is, if in aiding the private person who is discriminating the state is not infringing on a federal right of the person discriminated against—the right to life, freedom of speech, contract, due process, etc.

Would a private homeowner be prevented by the *Shelley* decision from calling the police and asking for their help and that of the state courts to keep a Catholic from coming into his house, or to eject one therefrom, the only motivation of the homeowner being that he just hated all Catholics? The answer is no, because the Catholic has no federal right to enter the home of another without the consent of its owner, whereas the homeowner does have the right to receive on his property only those whom he wants, and this even though the state itself could in no way discriminate against that Catholic simply because of his religion, and even though that homeowner could not by

restrictive covenant prevent his next door neighbor from filling his house with Catholics if he so desired.

Therefore, we come again to the pivotal point of this case before this Court. If McCrory's had the right to refuse to serve defendants at its white lunch counter and the right to have its request to defendants to leave the store complied with by them—and it is the State of Louisiana's position that McCrory's had these rights—then the action of the New Orleans Police and of the Louisiana courts in arresting and convicting these defendants is not state action prohibited by the Fourteenth Amendment.

## CONCLUSION

We believe that in arguing our case we have touched on most of the issues raised by defendants before this Court. We will now deal briefly with the issues which we have not yet discussed. See their Petition for Certiorari, p. 2-3, Questions Presented.

1. *Defendants were not convicted on a record barren of any evidence of guilt.*

Defendants were charged with criminal mischief, R.S. 14:59 (6), which is the intentional taking of temporary possession of any part of a place of business, or the intentional remaining in a place of business after the person in charge of the business has ordered the possessor to leave the premises and to desist from the temporary possession of the part.

The record in this case shows that defendants sat down at a lunch counter in McCrory's and remained there after the store manager had told them that he would not serve them and had asked them to leave the counter and the store. R. 122, 126, 127, 135.

2. *Defendants were not convicted under a penal provision which was so indefinite and vague as to afford no ascertainable standard of criminality.*

No criminal statute could be more specific and definite than R.S. 14:59 (6).

3. *Defendants were not arrested and convicted to enforce Louisiana's racial discrimination policy.*

Defendants were arrested and convicted because they insisted on remaining at a lunch counter at which

McCrory's wished to serve only white persons, probably because McCrory's manager thought that he could make more money that way than by operating an integrated lunch counter.

4. *The due process clause of the Fourteenth Amendment, which incorporates the free expression guarantee of the First Amendment, does not extend to illegal forms of expression.*

This question has already been fully discussed in our brief.

5. *The trial judge did not err in refusing to allow defendants the right to introduce evidence showing that the store owners were acting in concert with municipal and state law enforcement officers.*

McCrory's manager testified that he set the eating policy for his store—whether segregated or integrated—on the basis of local tradition and custom, as interpreted by him. R. 21, 22. Defendants made no attempt at the trial of this case to show that the manager's decision to keep his lunch counters segregated resulted from intimidation or bribery by city or state officials.

If McCrory's had the right to discriminate against defendants on the basis of race, it had the right to call law enforcement officers for help in getting defendants out of its store, and its manager had the right to meet with members of the New Orleans Police Department to discuss problems of sit-in demonstrations and how they should be handled if they occurred in his store. R. 23. The fact that the manager might

have had his plan for dealing with possible sit-ins approved in advance by the New Orleans Police, or that he might have adopted a plan suggested to him by the Police, would only show that he was a far-sighted, efficient, law-abiding manager. The natural thing for a businessman in his position to do would be to consult the local police about his rights in the matter.

As for the possibility that McCrory's manager might have discussed the sit-in situation with the managers of other department stores in New Orleans: under the decision of this Court in *Shelley v. Kraemer*, 334 U.S. 1, he not only had the right to discuss the situation with the other managers, but also had the right to enter into a restrictive agreement with them to keep all lunch counters in all department stores in the city segregated. Of course this agreement could not have been enforced by the Louisiana courts, but it could have been voluntarily adhered to by the managers. Restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed by the Fourteenth Amendment. "So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the state and the provisions of the Amendment have not been violated." *Shelley v. Kraemer*, supra. Therefore, defendants would have gained nothing by showing that such an agreement existed, if in fact it did. R. 96.

Let us suppose that Shelley, of *Shelley v. Kraemer* fame, had wanted to buy Kraemer's house, but



that the latter had refused to sell. If Shelley had nevertheless forced his way into Kraemer's house and had refused to leave until he received title to the place, certainly Kraemer could have called the police to oust Shelley, and the validity of Kraemer's action would not have been affected by the fact that he had discussed the possibility of such an invasion beforehand with his fellow homeowners and with the police, and that he acted in accordance with those discussions in ousting Shelley.

The only relevant evidence which defendants could have introduced in this area would have been evidence tending to show that state or city officials had forced McCrory's to maintain segregated lunch counters against its owners' will, by threatening reprisals in the event that the store's lunch counters were integrated by the local manager.

The fact that Louisiana state policy favors segregation of the races, R. 110, is immaterial in the instant case unless the state or city government compelled the manager of McCrory's to maintain segregated lunch counters. Only if McCrory's was forced by state or city officials to follow, against its will, a local custom of segregation would the Fourteenth Amendment come into play. Significantly, at no time during the trial of this case did defendants try to introduce evidence to establish this type of coercion. All that defendants tried to show during the trial, and claim now that they were injured by not being allowed to show, was

concert, or cooperation, between the manager of McCrory's, other department store managers, and the New Orleans Police. We submit that the trial judge was correct in excluding as irrelevant this type of evidence.

Therefore, even if we should view this allegation of error in the trial court in the light most favorable to defendants and should concede that if they had been permitted to do so by the trial judge they would have shown that the store owners were acting in concert with municipal and state law enforcement officers, such a showing would not add anything to their case.

6. *Hearsay evidence was not used to furnish one of the necessary elements in defendants' crime, or, if it was so used it was admissible as part of the res gestae under Louisiana law.*

Under Article 447 of the Louisiana Code of Criminal Procedure, R.S. 15:447, whatever forms any part of the res gestae is always admissible in evidence.

In *State v. Di Vincenti*, 232 La. 13, 93 So.2d 676, the Louisiana Supreme Court said that in this state the term res gestae is given a very broad interpretation "to include testimony, offered at the trial, of witnesses and police officers as to what they had heard or observed before, during, or after the commis-

Agreement in a design or plan; union formed by mutual communication of opinions and views; accordance in a scheme.  
Webster's Third New International Dictionary (1961)

sion of the crime, or immediately before or after the crime if causally related thereto."

7. *The Supreme Court of Louisiana found nothing objectionable in the questions asked of state witnesses in this case by the trial judge.*

See *State v. Goldfinch*, 241 La. 958, 132 So.2d 860—the case presently before this Court as it was reported below.

It is respectfully submitted that this Honorable Court does not have jurisdiction in this case because neither state action nor denial of due process under the Fourteenth Amendment to the United States Constitution is here involved; that the writ in this case should therefore be declared to have been improvidently granted; and that the judgment of the Supreme Court of Louisiana should be affirmed.

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**CERTIFICATE OF SERVICE**

I, William P. Schuler, Assistant Attorney General of the State of Louisiana, a member of the Bar of the Supreme Court of the United States, hereby certify that a copy of the above and foregoing Brief on behalf of the State of Louisiana to the Supreme Court of Louisiana has been deposited in the United States mail, postage prepaid, addressed to the attorneys for the petitioners, namely, Carl Rachlin, 280 Broadway, New York 7, New York, John P. Nelson, 535 Gravier Street, New Orleans, Louisiana, and Lolis E. Elie, 2211 Dryades Street, New Orleans, Louisiana.

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October, ....., 1962, New Orleans, Louisiana

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1962**

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**No. 11**

**JOHN THOMAS AVENT, ET AL., PETITIONERS**

**v.**

**STATE OF NORTH CAROLINA**

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**No. 58**

**RUDOLPH LOMBARD, ET AL., PETITIONERS**

**v.**

**STATE OF LOUISIANA**

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**No. 66**

**JAMES GOBER, ET AL., PETITIONERS**

**v.**

**CITY OF BIRMINGHAM**

---

**No. 67**

**F. L. SHUTTLESWORTH, ET AL., PETITIONERS**

**v.**

**CITY OF BIRMINGHAM**

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**No. 71**

**JAMES RICHARD PETERSON, ET AL., PETITIONERS**

**v.**

**CITY OF GREENVILLE**

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**ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF NORTH  
CAROLINA, LOUISIANA, AND SOUTH CAROLINA, AND TO THE  
COURT OF APPEALS OF ALABAMA**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE<sup>1</sup>

## OPINIONS BELOW

The opinion of the Supreme Court of North Carolina in *Avent* (A. 72-90)<sup>2</sup> is reported at 253 N.C. 580, 118 S.E. 2d 47.

The opinion of the Supreme Court of Louisiana in *Lombard* (L. 141-151) is reported at 241 La. 958, 132 So. 2d 860. The opinion of the Criminal District Court of Orleans Parish overruling petitioners' motion to quash (L. 28-86) is not reported.

The opinion and orders of the Alabama Court of Appeals (G. 57-64, 88, 124, 144, 178, 194, 220, 236, 262, 278) and the orders of the Supreme Court of Alabama (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278) in *Gober* are reported, *inter alia*, at 133 So. 2d 697-708.

The opinions of the Alabama Court of Appeals (S. 42-44, 67) and the orders of the Supreme Court of Alabama (S. 46, 69) in *Shuttlesworth* are reported at 134 So. 2d 213.

<sup>1</sup>This brief will not consider *Wright v. Georgia*, No. 68. Since that case involves arrests for unlawfully assembling on *municipal* property, it does not present the paramount issue considered in the cases discussed in this brief as to the rights of private businesses to exclude Negroes from all or a portion of their premises. We believe, however, that the convictions in *Wright* should be reversed for reasons advanced by the petitioners in that case. The United States, as *amicus curiae*, is filing a separate brief in *Griffin v. Maryland*, No. 26, this Term.

<sup>2</sup>The records in *Avent v. North Carolina*, No. 11, *Lombard v. Louisiana*, No. 58, *Gober v. Birmingham*, No. 66, *Shuttlesworth v. Birmingham*, No. 67, and *Peterson v. Greenville*, No. 71, are referred to as "A.," "L.," "G.," "S.," and "P.," respectively.



The opinion of the Supreme Court of South Carolina in *Peterson* (P. 55-59) is reported at 122 S.E. 2d 826. The opinion of the Greenville County Court (P. 50-52) is not reported.

#### JURISDICTION

The judgment of the Supreme Court of North Carolina in *Avent* was entered on January 20, 1961 (A. 90).

The judgment of the Supreme Court of Louisiana in *Lombard* was entered on June 29, 1961 (L. 149).

The judgments of the Alabama Court of Appeals in *Gober* were entered on May 30, 1961 (G. 57, 88, 124, 144, 178, 194, 220, 236, 262, 278). Petitions to the Supreme Court of Alabama for writs of certiorari were denied on September 14, 1961 (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278); and applications for rehearing were overruled on November 2, 1961 (G. 71, 92, 128, 144, 182, 194, 224, 236, 266, 278.)

The judgments of the Alabama Courts of Appeals in *Shuttlesworth* were entered on May 30, 1961 (S. 43, 66). Application for rehearing before the Court of Appeals of Alabama was denied on June 20, 1961 (S. 45, 68). A petition to the Supreme Court of Alabama for a writ of certiorari was denied on September 25, 1961 (S. 46, 69), and application for rehearing was overruled on November 16, 1961 (S. 51, 74).

The judgment of the Supreme Court of South Carolina in *Peterson* was entered on November 10, 1961 (P. 55), and a petition for rehearing was denied on November 30, 1961 (P. 62).

The petitions for writs of certiorari were granted by this Court on June 25, 1962 (370 U.S. 934-935; A. 92, L. 152, G. 279, S. 75, P. 65). The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

#### **QUESTIONS PRESENTED**

Petitioners are Negroes who were invited into department and variety stores as customers. They were refused service at lunch counters or in lunch rooms under the proprietor's practice of enforcing racial segregation in the store's dining facilities. In Nos. 11, 66, 67 and 71, there was little evidence as to motive, but the proprietor's practice of racial discrimination in fact conformed to current municipal ordinances requiring racial segregation in public eating places. In No. 58, although there was no ordinance specifically requiring segregation in public eating places, the proprietor's practice of racial discrimination knowingly conformed to a current and pervasive State policy of maintaining racial segregation expressed in numerous legislative enactments and official declarations. Petitioners in each case refused to leave the lunch counters or lunch rooms upon being denied service. They were arrested and convicted of criminal trespass or a similar offense.

The questions presented are:

1. Whether, upon the records in Nos. 11, 66, 67 and 71, the convictions are sufficiently related to the ordinances requiring racial segregation that they should be set aside on the ground that they result from a denial of equal protection of the laws in violation of the Fourteenth Amendment.

2. Whether, upon the record in No. 58, the convictions are sufficiently related to the State laws and policies maintaining racial segregation that they should be set aside on the ground that they result from a denial of equal protection of the laws in violation of the Fourteenth Amendment.

#### INTEREST OF THE UNITED STATES

The fundamental constitutional issue in these cases is to what extent the Fourteenth Amendment condemns, as a denial of equal protection of the laws, enforcement by the States of racial segregation in private businesses open to the general public. This problem involves not only the power of the States but also the constitutional rights of millions of American citizens. On the one hand, millions of Negroes (as well as some other groups) are subjected to racial discrimination in private businesses open to the public. The "sit-in" activities resulting in petitioners' convictions were part of a widespread peaceful protest against this practice. Petitioners claim that the involvement of the States in their convictions violates the equal protection clause of the Fourteenth Amendment. On the other hand, the respondents invoke both the power of the States to preserve order and also the freedom and responsibility of individuals to make their own decisions concerning the use of private property and choice of associates. Thus, the basic issue in these cases involves the competing claims of large numbers of citizens, and of the States, and is of grave importance to the country as a whole.

The petitions for certiorari in each of these cases urge various grounds for reversal. Since the primary interest of the United States is in the fundamental question which is described above, we will confine this brief on behalf of the United States to a discussion of that question.

#### STATEMENT<sup>1</sup>

##### 1. AVENT V. STATE OF NORTH CAROLINA, NO. 11

*a. Statutes Involved.*—Chapter 13, Section 42, of the Code of Durham, North Carolina (1947), provides:

In all licensed restaurants, public eating places and 'weenie shops' where persons of the white and colored races are permitted to be served with, and eat food, and are allowed to congregate, there shall be provided separate rooms for the separate accommodation of each race. The partition between such rooms shall be constructed of wood, plaster or brick or like material, and shall reach from floor to the ceiling. Any person violating this section shall, upon conviction, pay a fine of ten dollars and each day's violation thereof shall constitute a separate and distinct offense.

Petitioners were convicted of violating Section 14-134 of the North Carolina General Statutes, which provides:

*Trespass on land after being forbidden. \* \* \**

If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor and on conviction, shall be fined not

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<sup>1</sup> We have set forth fully only the facts of each of the cases that may be relevant to the legal issues that we consider in this brief.

exceeding fifty dollars or imprisoned not more than thirty days \* \* \*.

*b. The Facts.*—On May 6, 1960, petitioners, five Negro students from North Carolina College and two white students from Duke University, both of which are in Durham, North Carolina, entered Kress' Department Store in Durham (A. 1, 2, 4, 5, 6, 8, 9, 35). On the two selling floors of the store, there are approximately fifty counters (including a "standup" lunch counter) which serve Negroes and whites without racial distinction (A. 21, 22). No sign at the store's entrance barred or conditioned Negro patronage (A. 22). Petitioners made various purchases, as some of them had in the past, and eventually went to the basement lunch counter (A. 21, 35, 39, 41, 43, 46, 47, 48).<sup>4</sup> There a sign stated "Invited Guests and Employees Only" (A. 23). The manager testified that, although no invitations as such were sent out, white persons automatically were considered guests; Negroes, and whites accompanied by Negroes, were not

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<sup>4</sup> Petitioners were participants in an informal student organization which opposed racial segregation. They believed that they had a right to service at Kress' basement lunch counter after having been customers in other departments (A. 36, 40, 44-45). Some had previously picketed the store to protest its policy of welcoming Negroes' business while refusing them lunch counter service (A. 41, 43, 46, 48, 49). Some of the petitioners had requested and had been denied service on previous occasions at Kress' lunch counter (A. 37). Some of the petitioners testified that they expected to be served at the basement lunch counter because they had been served upstairs (A. 39, 48, 49). Various petitioners testified that they did not expect to be arrested for trespassing on this occasion (A. 37, 38, 41, 43, 48, 49).

(A. 21-23).<sup>\*</sup> The counter was separated from other departments by an iron railing (A. 21). The store manager testified that the entrances to the counter were chained, but petitioner Streeter denied this (A. 21, 37).

The manager declined to serve the students and asked them to leave (A. 21). He stated that if Negroes wanted service they might obtain it at a stand-up counter upstairs (A. 22). The manager then called the police (A. 21). After being asked by the police officers to leave, petitioners persisted in their refusal and were arrested for trespass (A. 21, 24-25).<sup>\*</sup>

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<sup>\*</sup> The manager testified that "the luncheonette was open for the purpose of serving customers food. Customers on that date were invited guests and employees" (A. 21). He testified further that "We had signs all over the luncheonette to the effect that it was open for employees and invited guests. Mr. Pearson [petitioners' Negro attorney], I do not consider you an invited guest, under the circumstances right now. I do consider Mr. Murdock [the State Solicitor] an invited guest under the circumstances" (A. 22). He also testified: "I would serve this young lady (indicating the white female defendant), but I asked her to leave when she gave her food to a Negro. She was my invited guest at that time, up until the time that I asked her to leave" (A. 23).

Portions of the record suggest that the police were already present at the time the manager first asked the students to leave (A. 35, 40, 42, 44, 47, 48). For example, petitioner Phillips testified that "When I took a seat at the lunch counter, I was approached by Mr. W. K. Boger, who said, 'You are not an invited guest, and you are not an employee; so I am asking you to leave.' Before I could ask him who he was, the police officer directed me to the back of the store" (A. 40).

<sup>\*</sup> It is not clear whether, after the arrival of the police officer, the manager again asked petitioners to leave (compare A. 21 with A. 24-25).

Petitioner Nelson, one of the white students, was asked to leave after she offered food to Negroes. The manager told her



The Kress manager explained his refusal to serve the students at the trial (A. 22-23):

\* \* \* It is the policy of our store to wait on customers dependent upon the customs of the community. \* \* \* It is the policy of our store to operate all counters in the interest of the customs of the community. \* \* \* In the interest of public safety it is our policy to refuse to serve Negroes at the luncheonette downstairs in our seating arrangements. It is also the policy of Kress to refuse the patronage of white people in the company of Negroes at that counter. Even if Negroes accompanied by white people were orderly at our luncheonette because of the policy of the community we would not serve them, and that was our policy prior to May 6, 1960. \* \* \* It is not the custom of the community to serve Negroes in the basement luncheonette, and that is why we put up the signs, "Invited Guests and Employees Only."

Petitioners were indicted in the Superior Court of Durham County, the indictments stating that each petitioner (A. 1-10):

with force and arms, \* \* \* did unlawfully, willfully, and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store \* \* \* said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and

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that she was "antagonizing the customers" (A. 42). Petitioner Brown was told by the manager that "[t]he custom has not been changed, and you will have to leave" (A. 44).



agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said [petitioner] after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that \* \* \* [petitioner] had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the state.<sup>7</sup>

Petitioners pleaded not guilty and were tried by a jury on June 30 and July 1, 1960 (A. 15-16). The jury returned a verdict of guilty (A. 16). Three of the petitioners received thirty-day sentences, one received a twenty-day sentence, one received a fifteen-day sentence, and, in two cases, sentence was continued for two years (A. 16-20).

On January 20, 1961, the Supreme Court of North Carolina affirmed the convictions (A. 73). In a lengthy opinion, the court emphasized that (A. 78):

No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants,<sup>8</sup> and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of White people in company with Negroes. In the absence of a statute for-

<sup>7</sup> The indictments of all the petitioners carried a racial designation, viz., "CM," "WM," "CF," and "WF" (A. 2, 3, 5, 6, 7, 9, 10).

<sup>8</sup> A municipal ordinance in Durham, however, does require segregation in restaurants. See *supra*, p. 6.

bidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law. \* \* \*

2. LOMBARD V. STATE OF LOUISIANA, NO. 58

*a. Statute Involved.*—The Louisiana statute under which petitioners were convicted is, La. R.S. 14:59(6), as amended 1960, which provides:

Criminal mischief is the intentional performance of any of the following acts:

\* \* \* \* \*

(6) Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business.

The statute states that "[w]hoever commits the crime of criminal mischief shall be fined not more than \$500.00, or imprisoned for not more than one year, or both."

*b. The Facts.*—On September 10, 1960, one week prior to the "sit-in" demonstration out of which this case arose, a group of Negroes conducted at Woolworth's Department Store in New Orleans, Louisiana, the first "sit-in" demonstration to occur in that city. On the same day, the New Orleans Superintendent of

Police issued the following statement, which was published in the New Orleans *Times-Picayune* (L. 17, 139-140):

The regrettable sit-in activity today at the lunch counter of a Canal St. chain store by several young white and Negro persons causes me to issue this statement to the citizens of New Orleans.

We urge every adult and juvenile to read this statement carefully, completely and calmly.

First, it is important that all citizens of our community understand that this sit-in demonstration was initiated by a very small group.

We firmly believe that they do not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population.

We believe it is most important that the mature responsible citizens of both races in this city understand that and that they continue the exercise of sound, individual judgment, goodwill and a sense of personal and community responsibility.

Members of both the white and Negro groups in New Orleans for the most part are aware of the individual's obligation for good conduct—an obligation both to himself and to his community. With the exercise of continued, responsible law-abiding conduct by all persons, we see no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans.

At the same time we wish to say to every adult and juvenile in this city that the police department intends to maintain peace and order.

No one should have any concern or question over either the intent or the ability of this department to keep and preserve peace and order.

As part of its regular operating program, the New Orleans police department is prepared to take prompt and effective action against any person or group who disturbs the peace or creates disorder on public or private property.

We wish to urge the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest.

Finally, we want everyone to fully understand that the police department and its personnel is ready and able to enforce the laws of the city of New Orleans and the state of Louisiana.\*

On September 13, 1960, four days prior to the "sit-in" demonstration out of which this case arose, Mayor DeLesseps Morrison also issued a statement which was printed in the *Times-Picayune*. The Mayor said (L. 14, 15, 138-139):

I have today directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted.

The police department, in my judgment, has handled the initial sit-in demonstration Friday

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\* At the trial of the petitioners in *Lombard*, the Superintendent of Police testified that the reason for his statement was that he "was hoping that situations of this kind would not come up in the future to provoke any disorder of any kind in the community" (L. 17).

and the follow-up picketing activity Saturday in an efficient and creditable manner. This is in keeping with the oft-announced policy of the New Orleans city government that peace and order in our city will be preserved.

I have carefully reviewed the reports of these two initial demonstrations by a small group of misguided white and Negro students, or former students. It is my considered opinion that regardless of the avowed purpose or intent of the participants, the effect of such demonstrations is not in the public interest of this community.

Act 70 of the 1960 Legislative session redefines disturbing the peace to include "the commission of any act as would foreseeably disturb or alarm the public."

Act 70 also provides that persons who seek to prevent prospective customers from entering private premises to transact business shall be guilty of disorderly conduct and disturbing the peace.

Act 80—obstructing public passages—provides that "no person shall wilfully obstruct the free, convenient, and normal use of any public sidewalk, street, highway, road, bridge, alley or other passage way or the entrance, corridor or passage of any public building, structure, water craft or ferry by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein."

It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demon-

strations cease and that henceforth they be prohibited by the police department.<sup>10</sup>

On September 17, 1960 (one week after the Superintendent's statement and four days after the Mayor's statement), the petitioners here, three Negroes and one white person, sat down at counter seats at the white refreshment counter at McCrory's Five and Ten Cents Store in New Orleans. McCrory's, which "caters to the general public," is a branch of a national chain doing business in thirty-four states (L. 19).

Although no sign indicated any racial restriction as to service, the counter where petitioners sat had been restricted to white patronage since 1938 (L. 105, 110). The counter manager (Mr. Graves) advised petitioners that he could not serve them there and that

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<sup>10</sup> The Mayor testified at petitioners' trial that the superintendent of police "serves under [the Mayor's] direction," and that "[i]t is the policy of my office and that of the City Government to set the line or direction of policy to the police department" (L. 13). The Mayor further testified that his statement was issued "following the initial sit-in and follow-up demonstration the next day, I believe by picketing in the same area, and I outlined to the police department and the community the two acts of the Legislature 70 and 80 which dealt with this matter and gave the reasons in the public interest that we should carry out the intent and purpose of the law" (L. 14). He testified that his statement "encompasse[d] any laws covering questions of disturbing the peace, of public acts which would create a disturbance or confusion, disturbances of the peace, and specifically quoted these two acts because they are of recent nature and somewhat specific in regard to the question, but I have a feeling that matters of this kind, when persons engage in this type of demonstration as a natural consequence will create disturbances of the peace and in many cases set off chain reactions that can be much more serious" (L. 16).



they could be served at a colored counter in the rear of the store (L. 105, 110). The petitioners made no reply (L. 105). Although petitioners were not creating a disturbance or doing anything except sitting at the counter (L. 108), Mr. Graves closed the counter because Negroes were present (L. 105, 108). Petitioners nonetheless remained seated. The police were called by store personnel (L. 107), and the store manager, Mr. Barrett, arrived (L. 112). Shortly thereafter several police officers arrived (L. 112). Mr. Barrett informed the police that he wanted the Negroes to leave, but an officer informed him that he must request them to leave in the presence of the police (L. 126). The police then witnessed Mr. Barrett's request to the petitioners that they leave the counter area (L. 113). When petitioners did not leave, a police officer, Major Reuther, informed them that they were violating the law "and if the manager insisted that they move we would have to put them under arrest" (L. 129). After a short period, the police arrested petitioners (L. 129), who were charged with criminal mischief under La. R.S. 14:59(6), *supra*, p. 10.

Testimony was adduced at a hearing on petitioners' motion to quash the information and at the trial on the merits concerning the reasons that petitioners were not served at the counter. The store manager testified that he exercises discretion as to whether Negroes should be served " (L. 21), and that "[t]he policy

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<sup>11</sup> Mr. Barrett testified that he was authorized by the "national office" of McCrory's chain to determine the segregation policies of the New Orleans store (L. 21). The trial court



[as to ~~serving~~ Negroes] is determined by local tradition, law and custom, as interpreted by me" (L. 21). The manager testified further that when, as occasionally happened, Negroes sought service at a white lunch counter he "would tell them we had a colored counter in the back, because they might be passing through from the North and not understand Southern customs" (L. 117-118).<sup>12</sup>

When asked whether "in the last 30 to 60 days [he had] entered into any conference with other department store managers here in New Orleans relative to sit-in problems" (L. 22) the manager replied that "[w]e have spoken of it" (L. 23).

Mayor Morrison and the Superintendent of Police testified concerning the custom in New Orleans with respect to segregated eating facilities. The Mayor stated that to his personal knowledge no lunch counter in the city served both Negroes and whites together (L. 15). The Superintendent of Police testified that, in his experience as a member of the police force for fifteen years, and as a resident of New Orleans, he had not known of "any public establishments that cater to both Negroes and whites at the same lunch counter in the city of New Orleans" (L. 18).

The trial court refused to allow a series of questions designed to ascertain whether the manager's decision

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sustained objections to questions designed to reveal the practice of McCrory's stores in other states (L. 19-20, 22) and the power of the national office to overrule a manager's decision (L. 22).

<sup>12</sup> Mr. Barrett also replied "[y]es, sir" to counsel's question whether his decision was based on "state policy and practice and custom in this area" (L. 25).

was dictated or influenced by "state policy." Thus, Mr. Barrett was not permitted to say whether he "discussed methods and means to handle these situations if they arise in any particular department store" (L. 23), although counsel observed that the "purpose of this Your Honor is a question of conformity with state policy" (L. 23). Again, the manager was not allowed to reply to questions as to whether "if the state policy or practice would be different you would exercise your discretion in a different manner" and whether "if there was no custom of segregated lunch counters or no state policy, the general atmosphere would be different, would you allow Negroes to eat at white lunch counters" (L. 25, 26). Similarly, the trial court ruled out a question to Mr. Graves, the counter manager, as to "why [he was] not allowed to serve them," despite counsel's contention that the question was "material, because if Mr. Graves felt there was some state policy that prevented him from serving these defendants this is a clear state action" (L. 109-110).<sup>13</sup>

The trial court also excluded a series of questions designed to ascertain whether the police had been actively involved in the manager's decision to refuse service to petitioners. Captain Cutrera, one of the arresting officers, was not permitted to say whether

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<sup>13</sup> Petitioners introduced into evidence a series of bills, some of which were ultimately enacted into law, of the 1960 session of the Louisiana state legislature. Petitioners contended that these bills and statutes (including the criminal mischief statute under which petitioners were convicted) demonstrated a state policy of racial discrimination (see L. 26-27 and the opinion of the Louisiana Supreme Court, quoted *infra*, p. 19).

"there was any plan approved by the police as to what [t store personnel] should do in the event of a sit-in" (L. 127-128). And Mr. Barrett was not allowed to reply to the question whether he had "ever met with members of the New Orleans Police Department and discussed problems of sit-in demonstrations and how you or how they should be handled if they arise in your store?" (L. 23). Similarly, counsel was not allowed to determine whether Mr. Graves had called the police "on his own initiative;" the question was asked in order to learn whether he had "any plan \* \* \* with the police" (L. 107)."

Petitioners were convicted of violating the "criminal mischief" law, sentenced to sixty days in jail, and fined \$350 each (L. 8). The convictions were affirmed by the Supreme Court of Louisiana. *State v. Goldfinch*, 132 So. 2d 860, 241 La. 958 (1961) (L. 141-149). The State Supreme Court rejected the contention that "by content, reference and position of context [the statute] is designed to apply to, and be enforced in an arbitrary manner against, members of the Negro race and those acting in concert with them" (L. 145), stating (L. 145-146):

\* \* \* In aid of this assertion certain House bills of the Louisiana legislature for 1960, introduced in the same session with the contested statute, were offered in evidence. All of these bills did not become law, but some did. It is declared that this law and the others enacted

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"Mr. Graves did testify at another point that he had called the police "as a matter of routine procedure," and that he had "no particular plan" for the handling of sit-ins; they were to be handled like any other emergency situation (L. 106).

during the same session were designed to apply to and be enforced against, in an arbitrary manner, members of the Negro race. We have carefully reviewed the provisions of these bills referred to which were enacted into law and nowhere in their content or context do we find that any of them seek to discriminate against any class, group, or race of persons. We therefore find no merit in this contention and, accordingly, dismiss it as being unsupported.

The court also considered the contention that "the action of the manager of McCrory's was provoked or encouraged by the state, its policy, or officers, and \* \* \* that this action of McCrory's was not its own voluntary action, but was influenced by the officers of the state" (L. 146). It held (L. 146-147):

The conclusion contended for is incompatible with the facts. Rather, the testimony supports a finding that the manager of McCrory's had for the past several years refused service to Negroes, that the policy of the store was established by him, that he had set out the policy and followed it consistently; that Negroes had habitually been granted access to only one counter within the store and a deliberately provoked mischief and disturbance such as the one he complained of here had not previously occurred. \* \* \*

Even under the provision of the questioned statute it is apparent that a prosecution is dependent upon the will of the proprietor, for only after he has ordered the intruder to relinquish possession of his place of business does a violation of the statute occur. The state, therefore, without the exercise of the pro-

prietor's will can find no basis under the statute to prosecute.

These facts lead us to the conclusion that the existence of a discriminatory design by the state, its officers or agents, or by its established policy, assuming such could have been shown, would have had no influence upon the actions of McCrory's. The action of bringing about the arrest of the defendants, then, was the independent action of the manager of the privately owned store, uninfluenced by any governmental action, design, or policy—state or municipal—and the arrest was accomplished in keeping with McCrory's business practice established and maintained long before the occasion which defendants seek to associate with a discriminatory design by the state. \* \* \*

The court further held that no constitutional provision prevented a proprietor of a restaurant from refusing service on the basis of race. It said (L. 148):

The defendants have sought to show through evidence adduced at the trial that there is no integration of the races in eating places in New Orleans and, therefore, the custom of the state is one that supports segregation and hence state action is involved. \* \* \*

In answer to this contention, the court stated that "segregation of the races \* \* \* is not required by any \* \* \* law of the State \* \* \* but is the result of the business choice of the individual proprietors, both white and Negro, catering to the desires and wishes of their customers, regardless of what may stimulate and form the basis of the desires" (L. 148).

3. *GOBER V. CITY OF BIRMINGHAM, NO. 66.*

*a. Statutes Involved.*—Section 369 of the General City Code of Birmingham, Alabama (1944), provides:

*Separation of races.*—It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment.

Petitioners were convicted of violating Section 1436 of the General City Code of Birmingham, Alabama (1944), which provides:

*After warning.*—Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties.

*b. The Facts.*—This case involves ten different petitioners. On March 31, 1960, the petitioners, in five groups of two, entered five department stores in the City of Birmingham. The facts relating to each of the cases are as follows:

(i) *Gober and Davis.*—Petitioners entered Pizitz's Department Store in Birmingham, Alabama (G. 43, 50). Petitioner Davis purchased stocks, toothpaste, and a handkerchief (G. 43). They then proceeded to the mezzanine lunch counter where they attempted to



order, but were ignored by the waitresses (G. 44). Although only white persons were seated at the lunch counter at the time, there was no sign indicating that the counter was reserved for whites (G. 44, 50). Petitioners were approached by Mr. Pizitz, assistant to the president of the store. Pizitz, who did not identify himself to petitioners, told them that Negroes were served elsewhere in the store (G. 23, 44-45). They were not directly asked to leave the store or the area in which they were sitting (G. 45). Mr. Pizitz's conversation with petitioners was described as follows (G. 23-24):

He asked the defendants to leave the tea room area, told them that they could be served in the Negro restaurant in the basement.

\* \* \* \* \*

He told them that they couldn't be served there and we had facilities in the basement to serve them. \* \* \* He told them it would be against the law to serve them there. \* \* \*

Mr. Gottlinger, the controller of Pizitz's, testified that no official of Pizitz called the police (G. 26). He also testified that no official of the company filed a complaint (G. 27).

Police Officer Martin of the Birmingham Police made the arrests (G. 19). He had received a report from a superior officer that there was a disturbance at Pizitz's (G. 19). He went to the dining area, found it closed to customers, and saw two Negro men seated and conversing together (G. 18-19). Martin heard no one speak to petitioners (G. 19). Following the direction of his superior, and without



himself warning petitioners, Martin placed them under arrest and charged them with trespassing after warning (G. 20).

(ii) *Hutchinson and King*.—Petitioners took seats at tables in the mezzanine dining area at Loveman's Department Store (G. 107, 115). Loveman's is a general department store and invites Negro trade in all departments with the exception of dining facilities (G. 114, 120). The dining room is a concession run by the Price Candy Company but follows Loveman's policies and regulations (G. 114).<sup>15</sup>

Soon after petitioners were seated, Mr. Kidd, a member of the store's protective department, appeared.<sup>16</sup> At the trial, he described what occurred in these terms (G. 115):

There was two colored boys sitting on the mezzanine and I notified the people who were milling around, I notified all of the people, white people, to leave as we were closing the mezzanine in their presence—I did not directly speak to the two colored boys who were sitting at a table \* \* \*.<sup>17</sup>

Mr. Kidd announced three times that the dining area was closed and put up signs to that effect (G.

<sup>15</sup> Mr. Schmid, the dining area concessionaire, testified that he knew of no dining facilities in Loveman's for Negroes (G. 113-114). However, Mr. Kidd of Loveman's protective department testified that the store did have separate dining facilities for Negroes (G. 119).

<sup>16</sup> Apparently, a restaurant employee called the protective department (G. 112). According to Mr. Schmid, this had been done since, "naturally," there was a "disturbance of the peace" (G. 112). The only actual disturbance described, however, was that " \* \* \* the waiters went off the floor" (G. 112).

<sup>17</sup> Mr. Schmid likewise did not speak to petitioners (G. 110).

116).<sup>18</sup> About forty or fifty people were seated at the time these announcements were made, and some of them apparently stayed and finished their lunches (G. 111).

About twenty-five white patrons were seated when the police arrived, but none were arrested (G. 113).<sup>19</sup>

There is nothing in the record to indicate who called the police.<sup>20</sup> Police officer Martin, who arrested petitioners, had been told by a motorcycle policeman to go to Loveman's (G. 107). At the dining area, he observed a rope tied from one post to another and a sign stating that the area was closed (G. 107). He saw two Negro men at a table but had no conversation with them "other than to tell them they were under arrest" (G. 107). Officer Martin did not know of his own personal knowledge that anyone from Loveman's had asked petitioners to leave but believed that his superior officer knew this (G. 108).<sup>21</sup> Martin

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<sup>18</sup> When asked what caused him to close the lunchroom, Kidd testified: "The commotion that was on the mezzanine. I did not know what was the cause of the commotion. When I began closing the place down then I noticed after the crowd had dispersed that the two colored boys were occupying a table" (G. 117). The commotion Kidd referred to was the people standing up and milling around (G. 117).

<sup>19</sup> Mr. Kidd testified, however, that everyone left immediately when he announced the closing of the lunch-room (G. 118).

<sup>20</sup> Mr. Schmid did not know who called the police and testified that his secretary and cashier had instructions to call the store detective in case of disturbances (G. 112).

<sup>21</sup> Apparently at about the time of the arrest, Police Lieutenant Purvis approached Mr. Schmid and stated that "someone called us that you had two people in here that were trying to be served \* \* \*" (G. 112). Schmid pointed to petitioners (G. 112).

charged petitioners with trespass after warning (G. 109).

(iii) *Parker and West*.—Petitioners entered Newberry's, a variety store open to the general public (G. 158, 165). There are two lunch counters in Newberry's for white customers—one on the first floor where these "sit-ins" occurred and one in the basement (G. 163). There is a Negro lunch counter on the fourth floor which has a "for colored only" sign (G. 163, 166).

At least one of the petitioners made purchases of paper and books (G. 170). They then sat at the lunch counter (G. 158-159). No sign at the lunch counter indicated that it was reserved for whites (G. 166, 171). When Mrs. Gibbs, the store detective, saw the petitioners, she (G. 162):

\* \* \* went over to the lunch counter \* \* \*  
and identified myself and told them that they would have to leave, they couldn't be served there, but if they would go to the fourth floor we have a snack bar for colored there and they would be served on the fourth floor.

Assistant Store Manager Stallings also spoke with petitioners (G. 164):

Well I asked them, I said, "You know you can't do this." I said, "We have a lunch counter up on the fourth floor for colored people only. We would appreciate it if you would go up there."

Mr. Stallings did not call the police, did not make a complaint to the police, and did not know whether

anybody else did" (G. 165). Police officer Myers was directed by a radio call from police headquarters to proceed to Newberry's (G. 158-159). Myers understood that a fellow officer had received a complaint from a Mr. Stallings, whose capacity at the store—or even whether he was an employee of Newberry's—Myers did not know (G. 160-161). At Newberry's, he encountered something "out of the ordinary," viz., "[t]wo colored males were sitting at the lunch counter" (G. 158). Myers did not speak with petitioners nor did he witness a conversation among petitioners and any store employee (G. 159). Nevertheless, Myers arrested petitioners for trespass after warning.<sup>23</sup>

(iv) *Sanders and Westmorland*.—Petitioners entered the Kress dime store in Birmingham, a general department store soliciting the trade of the general public (G. 214-215). It has no food service facilities for Negroes (G. 215), who are, however, invited to buy food and bakery items to carry out (G. 218). White and Negroes purchase from the same counters at other departments (G. 216).

<sup>23</sup> Stallings, when asked "Did any other official at Newberry's call the police?" replied: "Someone, now I don't remember who this person was, but someone said to me that we called the police. I don't know who it was. I don't remember that" (G. 165).

<sup>24</sup> Petitioner West testified that when officer Myers arrived on the scene he began to motion white people away from the lunch counter but all of them did not leave (G. 172). "After he started motioning the white people away," West stated, "we started to get up and when we started to get up one got me in the back or somewhere in behind. \* \* \* After I saw him motioning other people up I said, 'Let's go.' And we started to get up" (G. 172).

After petitioners sat down at a bay in the lunch counter, Kress' lunch counter manager told them "we couldn't serve them and they would have to leave" (G. 211). After the manager turned out the lights in the bay in which petitioners were sitting, petitioners moved to another (G. 211). The manager then closed down all the bays and turned out all the lights in the bays (G. 212).

Officer Caldwell, upon receiving a call to go to Kress' store, went to the basement and observed that the lunchroom was closed and "two black males" were "sitting there" (G. 209). The manager then informed the policeman, in the presence of petitioners, that "they couldn't be served and he had turned the lights out and closed the counter" (G. 209).<sup>24</sup> Two policemen entered the bay where petitioners were seated and twice asked them to get up (G. 212). After additional policemen entered, officer Caldwell arrested petitioners, although no one had asked him to do so (G. 209, 210), and the officers escorted petitioners from the store (G. 212).<sup>25</sup>

(v) *Walker and Willis*.—Petitioner Walker entered Woolworth's store to purchase handkerchiefs and a birthday gift for a friend (G. 255). Petitioner Willis purchased various non-food items (G. 255).

<sup>24</sup> The officer did not hear anyone tell petitioners to leave the counter (G. 210). The counter manager had not called the police, requested an arrest or signed a complaint. Nor did the store manager do any of these things in the counter manager's presence (G. 213-214).

<sup>25</sup> A woman already seated at the counter remained after the "closing" and, so far as the counter manager knew, was not arrested (G. 217-218).

They were not refused service at any non-food counter (G. 257-258), and Walker testified that he "really expected service" at the lunch counter because he "had been served prior to coming to the [lunch] counter" (G. 259).

Petitioners proceeded to the lunch counter and sat down (G. 255). There were no signs indicating that the lunch counter was reserved for whites (G. 257). A waitress said to petitioner, "I'm sorry I can't serve you," but they remained seated at the counter (G. 256).

Two police officers arrived in response to a call from the Birmingham police radio (G. 252). Mrs. Evans, the manager of the lunch counter, informed one officer that "she had told the boys to leave, that the place was closed, and the second time she directed her conversation to the defendants and told them it was closed and they would have to leave, she would not serve them" (G. 252-253).<sup>26</sup> Officer Casey testified that no one directly instructed the police to arrest petitioners (G. 253-254), but that he understood Mrs. Evans' "complaint" that "she wanted the boys out of the store" as a request to remove them (G. 253). When asked "did you take it upon yourself to make these arrests," officer Casey replied: "I did under authority of the City of Birmingham" (G. 253).

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<sup>26</sup> This was the testimony of police officer Casey. Petitioner Walker, on the other hand, testified that no one connected with the store management had ever asked petitioners to leave, and that he did not see Mrs. Evans at the store at the time of the incident (G. 256).

Some white customers were ordered to leave the counter, and one was forced to do so by the police but was not arrested (G. 256). Finally a policeman "asked [petitioners] to leave," saying, "Let's go," and informed them that they were under arrest (G. 257). Officer Casey testified that at the time of arrest or shortly thereafter he informed petitioners that they had been arrested for trespass after warning (G. 254).

The complaint against each of the ten petitioners charged that he or she "did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as \* \* \* [the store in question] after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944" (G. 2-3, 73-74, 93, 129, 145, 183, 195-196, 225, 237, 267). Petitioners were convicted in the Recorder's Court of the City of Birmingham. On appeal, they then received successive trials *de novo* in the Circuit Court of Jefferson County with the same judge, prosecutor and defense counsel.

At the first trial (*Gober and Davis*), petitioners tried to question a store official concerning the segregation ordinance of the City of Birmingham (Section 369 of the City Code of Birmingham) (G. 24-25):

Mr. HALL [counsel for petitioners]. \* \* \* It is our theory of this case it is one based simply on the City's segregation ordinance and Mr. Gottlinger, Mr. Pizitz, the police officers and everybody involved acted simply because of the



segregation law and not because it was Pizitz policy.

Mr. HALL. As I understand it it is the theory of the City's case, it is trespass after warning. Our contention is that that is not a fact at all, it is simply an attempt to enforce the segregation ordinance and we are attempting to bring it out.

The COURT. Does the complaint cite some statute?

Mr. HALL. Trespass after warning. If we went only on the complaint it would seem that some private property has been abused by these defendants and that the owner of this property has instituted this prosecution. From the witness' answers it doesn't seem to be the case. It seems it is predicated on the segregation ordinance of the City of Birmingham rather than on the trespass. So what we are trying to bring out is whether or not the acts of Pizitz were based on the segregation ordinance or something that has to do with trespass on the property.

The court refused to permit the store official to be interrogated about his knowledge of the law, on the ground that the reason that the store excluded petitioners was immaterial (G. 25-26). During the *Parker and West* trial, petitioners' counsel likewise attempted to establish that petitioners were arrested because of the segregation policies of the City of Birmingham and not because of any policy of the store (G. 166-168). The court again ruled that this line of inquiry was not "competent" (G. 168).

Petitioners were again admitted guilty in the Circuit Court and, in a common sentencing proceeding, were fined \$100 and given thirty days' hard labor, with additional time for failure to pay the fine and court costs<sup>27</sup> (G. 10-11, 82, 101-102, 137-138, 153, 188, 203-204, 230, 245-246, 272). The Alabama Court of Appeals, affirming the conviction, wrote an opinion for the first case, *Gober v. State of Alabama*, and affirmed all others in brief *per curiam* orders citing *Gober* (G. 57-64, 88, 124, 144, 178, 194, 220, 236, 262, 278). In its opinion in *Gober*, the Court of Appeals stated that "there is no question presented in the record before us, by the pleading, of any statute or ordinance requiring the separation of the races in restaurants. The prosecution was for a criminal trespass on private property" (G. 63). The court noted that petitioners were licensees and entered the premises by implied invitation and that, under such circumstances, the owners of the premises had the right to place limitations as they saw fit (G. 63). "It is fundamental," the court held, "and requires no citation of authority, the grantor of a license, which has not become coupled with an interest, may revoke the license at will" (G. 64). The Supreme Court of Alabama denied certiorari in all the cases by identical orders (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278).

<sup>27</sup> For example, petitioner Gober was sentenced to 52 days of hard labor for failure to pay his \$100 fine and the \$5 costs accrued in the Recorder's Court, and to an additional 60 days of hard labor for failure to pay the costs accrued in the Circuit Court. The State of Alabama also was authorized to recover from Gober the costs expended for feeding Gober while he was in jail (G. 11; see also G. 82, 101-102, 137-138, 153, 188, 203-204, 230, 245-246, 272).

## 4. SHUTTLESWORTH V. CITY OF BIRMINGHAM, NO. 67

*a. Statutes involved.*—Petitioners were convicted of violating Section 824 of the General City Code of Birmingham, Alabama (1944). Section 824 provides:

It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor.

Sections 369 and 1436 of the Birmingham code, which are also involved, are set forth above at page 22.

*b. The Facts.*—The record shows that James Gohber (one of the petitioners in the *Gohber* case (see *supra*, pp. 22-24) went to petitioner Shuttlesworth's home on March 30, 1960 (S. 27-28). Shuttlesworth, his wife, several students from Daniel Payne College, and petitioner Billups, who had driven one of the students to Shuttlesworth's home, were present (S. 28, 31). Petitioner Shuttlesworth "asked for volunteers to participate in the sit down demonstrations" (S. 29). A "list," not otherwise described, was prepared (S. 30). One student "volunteered to go to Pizitz [a department store] at 10:30 [a.m.] [the next day] and take part in the sit down demonstrations" (S. 31). Shuttlesworth "didn't say that he would furnish Counsel but told him or made the announcement at that time that he would get them out of jail" (S. 31-32).

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<sup>28</sup> The record of the trial court proceedings in this case consists largely of testimony of a city detective in the Circuit Court of Jefferson County describing the evidence adduced at an earlier trial of petitioner Shuttlesworth for the offense in the city recorder's court. Objections were regularly made to this testimony by the defendants on hearsay grounds (see, *e.g.*, S. 24-25).

Gober and other students present at the meeting did participate in a "sit-in" demonstration, not otherwise described, on the next day, March 31, 1960 (S. 33).

Petitioners Shuttlesworth and Billups were charged with violating Section 824 of the Code of Birmingham, *supra*, by inciting or aiding or abetting "another person to go or remain on the premises of another after being warned not to do so," in violation of Section 1436 of the Birmingham Code, *supra* (S. 2, 53). They were convicted by the city recorder's court. On appeal to the Circuit Court of Jefferson County, they were separately tried *de novo*. Petitioners Shuttlesworth and Billups were again convicted by the court sitting without a jury, and sentenced, respectively, to 180 days hard labor and a \$100 fine, and 30 days' hard labor and a \$25 fine (S. 40).

The convictions were affirmed by the Court of Appeals of Alabama. The court stated, in the *Shuttlesworth* case, that "[e]veryone who incites any person to commit a crime is guilty of a common law misdemeanor, even though the crime is not committed" (S. 44). It also held (S. 44):

There is no question of the restriction of any right of free speech or other assimilated right derived from the Fourteenth Amendment, since the appellant counseled the college students not merely to ask service in a restaurant, but urged, convinced and arranged for them to remain on the premises presumably for an indefinite period of time. There is a great deal of analogy to the sit-down strikes in the automobile industry referred to in *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240.

In the *Billups* case, the Court of Appeals simply adopted the findings of fact and the legal conclusions set forth in the *Shuttlesworth* case (S. 67). On September 25, 1961, the Supreme Court of Alabama denied writs of certiorari in both cases, and on November 16, 1961, rehearings were denied (S. 46, 69).

5. PETERSON V. CITY OF GREENVILLE, NO. 71

a. *Statutes Involved.*—Section 31-8, Code of Greenville, South Carolina, 1953, as amended in 1958, provides:

It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. Separate facilities shall be interpreted to mean:

(a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise;

(b) Separate tables, counters or booths;

(c) A distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served;

(d) The area referred to in subsection (c) above shall not be vacant but shall be occupied by the usual display counters and merchandise found in a business concern of a similar nature;

(e) A separate facility shall be maintained and used for the cleaning of eating utensils and dishes furnished the two races.

Petitioners were convicted of violating Section 16-388, Code of Laws of South Carolina, 1952, as amended in 1960, which provides:

Any person:

(1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned within six months preceding, not to do so or

(2) Who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,

Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

*b. The Facts.*—At about 11:00 a.m. on August 9, 1960, petitioners, ten Negro students, took seats at the lunch counter at the Kress department store in Greenville, South Carolina, and requested service (P. 1, 19, 36). The Kress store in Greenville is open to the general public; it has fifteen to twenty departments and sells over 10,000 items (P. 21). Negroes and whites are invited to purchase and are served alike, except that Negroes are not served at the lunch counter (P. 21).

When petitioners requested service at the lunch counter, they were told by a Kress employee, "I'm sorry, we don't serve Negroes" (P. 19, 36). Petitioners refused to leave, and G. W. West, the Kress

manager, directed that the police be called (P. 22).<sup>29</sup>

Captain Bramlette of the Greenville Police Department received the call to proceed to the Kress store (P. 7). He was told that there were young colored boys and girls seated at the lunch counter (P. 10). Captain Bramlette testified that he did not know the origin of the telephone call (P. 7, 10). When Captain Bramlette, with several city policemen, arrived at the store, he found two agents of the State Law Enforcement Division already present at the lunch counter (P. 7). In the presence of the police officers, the lunch counter lights were turned off and manager West requested "everybody to leave, that the lunch counter was closed" (P. 19, 15). At petitioners' trial, their counsel was denied permission to ascertain whether this request followed arrangement or agreement with the police (P. 23, 24-25). After

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<sup>29</sup> Doris Wright, one of the petitioners, testified that on an earlier occasion she had spoken to the Kress manager about the stores' policy of lunch counter segregation and was assured that charges would not be pressed against Negroes who sought service (P. 38).

<sup>30</sup> The South Carolina Law Enforcement Division was organized to assist local law enforcement officers. Officer Hillyer of the Division, present at the time of the incident, testified that his immediate superior is Chief J. P. Strom, who is directly under the authority of the Governor of South Carolina (P. 43).

Petitioner Wright testified that the request to leave was made by the police and not by Mr. West (P. 38). She denied that Mr. West asked her or any of the other petitioners to leave (P. 41). When asked, "Of course, you are not in position to say whether or not Mr. West may have made a request to some of the other nine?" she replied, "Yes, I am. Mr. West, come from the back of the store, at the time we were being arrested and were told that the lunch counter was closed" (P. 41).



about five minutes,<sup>32</sup> during which petitioners had made no attempt to leave the lunch counter, Captain Bramlette placed them under arrest for trespassing (P. 19).<sup>33</sup> Store manager West did not request that petitioners be arrested (P. 16, 24).

White persons were seated at the counter when the announcement to close was made but none were arrested (P. 19). Mr. West testified that, when the lights went out, the white customers departed (P. 19). But a white customer testified that, at the time of the arrests, some white persons were still seated at the counter (P. 30-31). As soon as petitioners were removed by the police, the lunch counter was reopened (P. 23).

Manager West testified that he closed the counter because of local custom and because of the Greenville city ordinance requiring racial segregation in eating facilities (P. 23):

**Q.** Mr. West, why did you order your lunch counter closed?

**A.** It's contrary to local custom and it's also the ordinance that has been discussed.

**Q.** Do I understand then further, that you are saying that the presence of Negroes at your lunch counter was contrary to customs?

**A.** Yes, sir.

**Q.** And that is why you closed your lunch counter?

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<sup>32</sup> There is some conflict in the record regarding the time lapse between the announcement that the counter was closed and the arrests (see P. 29, 37, 38, 45).

<sup>33</sup> Four other Negroes were also arrested but their cases were disposed of by the juvenile authorities (P. 7).

A. Yes, sir, that's right.<sup>24</sup>

The record is conflicting as to whether Captain Bramlette thought he was acting under the Greenville segregation ordinance or the State trespass law. At one point, the Captain testified that he did not have the city ordinance in mind when he went to Kress but was thinking of the recently passed State trespass statute (P. 11). When asked however, why he arrested petitioners, he said (P. 15):

A. Under the State Law just passed by the Governor relative to sit-down lunch counters in Greenville, I enforced this order.

Q. But the State Law that just passed and signed by the Governor in May doesn't mention anything about Negroes sitting at lunch counters, does it?

A. It mentions sit-ins.

However, after refreshing his recollection, the Captain conceded that the new State law did not mention sit-ins (P. 15). He further testified as follows (P. 16-17):

Q. Did the manager of Kress, did he ask you to place these defendants under arrest, Captain Bramlette?

A. He did not.

Q. He did not?

A. No.

Q. Then why did you place them under arrest?

A. Because we have an ordinance against it.

Q. An ordinance?

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<sup>24</sup> Mr. West testified (P. 21) that the policy of following local custom was prescribed by Kress' headquarters.

A. That's right.

Q. But you just now testified that you did not have the ordinance in mind when you went over there?

A. State law in mind when I went up there.

Q. And that isn't the ordinance of the City of Greenville, is it?

A. This supersedes the order for the City of Greenville.

Q. In other words, you believe you referred to an ordinance, but I believe you had the State statute in mind?

A. You asked me have I, did I have knowledge of the City ordinance in mind when I went up there and I answered I did not have it particularly in my mind, I said I had the State ordinance in my mind.

Q. I see and so far this City ordinance which requires separation of the races in restaurants, you at no time had it in mind, as you went about answering the call to Kress' and placing these people under arrest?

A. In my opinion the State law was passed recently supersedes our City ordinance.

Petitioners were tried and convicted in the Recorder's Court of Greenville before the City Recorder, sitting without a jury, of violation of the South Carolina trespass law and sentenced to pay a fine of one hundred dollars or serve thirty days in the city jail (P. 47). Petitioners appealed to the Greenville County Court, and their appeal was dismissed on

<sup>36</sup> Although the trial judge appears to have denied petitioners' motion to make the Greenville segregation ordinance a part of the record (P. 46-47), it nevertheless has been incorporated into the record (P. 49).

March 17, 1961 (P. 50). That court noted that the trespass statute was merely a reenactment of the common law which permits a property owner to order any person from his premises whether they be an invitee or an uninvited person and that the constitutionality of the statute was unquestioned (P. 50-51). The court rejected petitioners' contention that they had a right to be served (P. 52).

On November 10, 1961, the Supreme Court of South Carolina affirmed the judgment and sentences (P. 55). It held that the operator of a privately owned business may accept some customers and reject others on purely personal grounds, in the absence of a statute to the contrary (P. 58). The court also held that there was nothing in the record to substantiate a claim that petitioners were actually prosecuted under the Greenville segregation ordinance (P. 59). The Supreme Court denied rehearing on November 30, 1961 (P. 62).

### ARGUMENT

#### INTRODUCTION AND SUMMARY

We believe it important at the outset to define, and if possible limit, the issue in these cases.

The Fourteenth Amendment provides:

\* \* \* nor shall any State \* \* \* deny to any person within its jurisdiction the equal protection of the laws.

In the *Civil Rights Cases*, 109 U.S. 3, decided shortly after the adoption of the Fourteenth Amendment, this Court held that the Amendment drew a fundamental distinction between a State's denial of

equal protection of the laws and discrimination by private individuals, however odious. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment" (*id.*, p. 11).

For a century, this basic postulate has been consistently applied in the courts. This brief does not question its validity. On the one hand, a State cannot constitutionally prohibit association between Negroes and whites, be it in a public restaurant or elsewhere. On the other hand, to cite an example, if a private landowner should invite all of his neighbors to use his swimming pool at will and then request one of the invitees to leave because of his race, creed or color, the decision would be private and, however unpraiseworthy, not unconstitutional. Furthermore, we take it that there would be no denial of equal protection if the State made its police and legal remedies available to the owner of the swimming pool against any person who came or remained upon his property over his objection. For, in a civilized community, where legal remedies have been substituted for force, private choice necessarily depends upon the support of sovereign sanctions. In such a case, the law would be color-blind and it could not be fairly said, we think, that the State had denied anyone the equal protection of its laws.

With respect to these "sit-in" cases it has been argued most broadly that the requisite State action is to be found in the arrests by the police, the prosecutions and the convictions, and that since discrimi-

nation against Negroes resulted from this State action, it violates the constitutional guarantee of equal protection of the laws. Cf. Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. of Pa. L. Rev. 473. Our example of the private residence and swimming pool is to be distinguished (the argument runs) upon the ground that, although that case too would involve State action and thus raise a federal constitutional question if there was an arrest and prosecution, nevertheless, the owner's right of privacy should outweigh the neighbor's claim to be free from racial discrimination. Against this, the States will no doubt argue that the two cases are alike because the State does not deny equal protection of the law when it indiscriminately offers to support the decision of the private landowner without regard to the landowner's reasons.

We believe that this broad issue need not, and should not, be decided in the cases at bar. We express no opinion upon it. We assume *arguendo* that in the absence of other grounds for holding the State responsible the principle invoked by the States is applicable to uninvited entrants upon business property, where the business is neither subject to a legal duty to serve the public (as in the case of inns and common carriers) nor owned or managed by one exercising sovereign functions. In our view, however, the principle is not applicable to the present cases.

One significant difference is that these cases do not involve in any substantial sense the landowner's privilege of deciding whom he will bar from his

premises and whom he will invite upon them as social guests or business visitors. In these cases the Negroes were invited into the store and were lawfully on the premises. In the *Lombard* case, for example, McCrory's Five and Ten Cent Store caters to the general public, both whites and colored, and even at the lunch counter restricted to white patronage there was no sign indicating the restriction. The situation was substantially the same in *Peterson*, *Gober* and *Shuttlesworth*. The all-white lunch room in *Acent* was expressly restricted to "invited guests," which perhaps impliedly excluded the petitioners in that case, but all other portions of the store were open to Negroes and their patronage was solicited without discrimination. The only real restriction, therefore, was a policy of refusing to allow white and colored to break bread together. Although this restriction can be cast in the language of the law of trespass by saying that the owner may revoke the consent to enter, the terminology cannot conceal the fact that the sole reason for revocation was petitioners' refusal to accept a stigma of social inferiority. While this circumstance may not directly bear upon the question of the States' responsibility, it plainly shows that no substantial claim to constitutional rights in private property is involved in these cases. Cf. *Marsh v. Alabama*, 326 U.S. 501, 505-507.<sup>36</sup>

<sup>36</sup> Also, Mr. Justice Frankfurter, concurring, said "And similarly the technical distinctions on which a finding of 'trespass' so often depends are often too tenuous to control [a] decision regarding the scope of the vital liberties guaranteed by the Constitution." 326 U.S. at 511. Cf. *Shelley v. Kraemer*, 334 U.S. 1, 22; *Barrows v. Jackson*, 346 U.S. 249, 260.



Still more important in the cases at bar, the States, which instituted the prosecutions, share the responsibility for the invidious discrimination, so that the State denial of equal protection does not depend upon the arrests and prosecution alone. In the *Arant*, *Gober* and *Peterson* cases, municipal ordinances required racial segregation in public eating places. In the *Shuttlesworth* case, petitioners were convicted of aiding and abetting Negroes to sit in lunch counters reserved for whites in a city where an ordinance required segregation in restaurants. In the *Lombard* case, the State's laws and policies, effectively and persistently implemented throughout the community, had a similar effect, albeit there was no ordinance in terms requiring the exclusion of Negroes from the establishment in question.

Accordingly, we submit that the only question now requiring decision is whether, judged against the background of the owner's willingness to serve Negroes in other parts of the stores, the States' influence upon the owner's decision to discriminate in serving food, through explicit segregation ordinances in four cases and through a general policy of promoting racial segregation in the fifth, was sufficient on these records to make the States' activities, taken as a whole, a denial of equal protection of the laws. If so, the resulting convictions must be reversed.

It is one thing for the State to enforce, through the laws of trespass, exclusionary practices which rest simply upon individual preference, caprice or prejudice. It is quite another for the State, exercise-

ing as it does immeasurable influence over individual behavior, to induce racial segregation and then proceed to implement the acts of exclusion which it has brought about. If the State, by its laws, actions, and policies, causes individual acts of discrimination in the conduct of a business open to the public at large, the same State, we believe, cannot be heard to say that it is merely enforcing, in even-handed fashion, the private and unfettered decisions of the citizen.

To sustain the judgments of conviction in the instant cases in the face of the segregation ordinances and official policies, the Court, we believe, would be obliged, at a minimum, to find (1) that the acts of discrimination were shown not to be a result of the State's laws and policies or of the actions of State officials and (2) that the petitioners, when ordered to leave the premises in question, were on notice that the proprietor was acting to assert his own rights, rather than in obedience to the State's unconstitutional command. In these cases, neither finding can be made. For aught that appears, the State, in each instance, laid the foundation for the criminal conviction by its own mandates of segregation.

# I

THE CONVICTIONS OF THE PETITIONERS IN *Arent, Gober, Shuttlesworth* AND *Peterson* VIOLATE THE FOURTEENTH AMENDMENT BECAUSE IT MUST BE CONCLUDED THAT THE FORCE OF MUNICIPAL LAWS CAUSED THE PROPRIETORS TO DISCRIMINATE

While the petitioners in *Arent, Gober*, and *Peterson* were convicted of trespassing for refusing to leave racially segregated lunch counters, these cases

cannot be divorced from the fact that the allegedly criminal acts occurred in communities which had ordinances affirmatively requiring racial segregation at establishments where food is served. (The *Shuttlesworth* case, involving a charge of aiding and abetting the violation of Alabama's criminal trespass statute, turns on the same considerations which govern the *Gober* case.) The City of Durham, North Carolina (see *supra*, pp. 6-7),<sup>37</sup> the City of Birmingham, Alabama (see *supra*, p. 22), and the City of Greenville, South Carolina (see *supra*, pp. 35-36), all had ordi-

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<sup>37</sup> In the *Gober* case, the Alabama Supreme Court held that the Birmingham ordinance was not properly pleaded and therefore was not before the court on appeal. This reasoning is plainly insubstantial, since it is well established that the Alabama courts can take judicial notice of municipal ordinances. See 7 Code of Alabama (1940), § 429(1); *Shell Oil v. Edwards*, 263 Ala. 4, 81 So. 2d 535; *Smiley v. City of Birmingham*, 255 Ala. 604, 605, 52 So. 2d 710; *Monk v. Birmingham*, 87 F. Supp. 538 (N.D. Ala.), affirmed, 185 F. 2d 859 (C.A. 5), certiorari denied, 341 U.S. 940. Therefore, the ordinance was properly before the Alabama courts and may be considered by this Court.

We recognize that the existence of the Durham segregation ordinance was not called to the attention of the courts below and that no argument based on that ordinance was advanced in the petition for certiorari in the *Acet* case. Nevertheless, on occasion, this Court has decided cases on a ground not raised below. See, e.g., *Terminiello v. Chicago*, 337 U.S. 1. This practice is particularly appropriate where it furthers this Court's historic refusal to adjudicate far-reaching constitutional questions except where such adjudication is absolutely necessary to the decision. See, e.g., the concurring opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-348. Accordingly, should this Court conclude that the existence of the segregation ordinances in

nances forbidding eating establishments from serving whites and Negroes on a nonsegregated basis. We submit that the decision of restaurant owners to discriminate under the compulsion of these ordinances constitutes State action in violation of the Fourteenth Amendment. From that, it necessarily follows that the arrest and conviction of persons for refusing to obey this decision to discriminate likewise violates the command of the Constitution.

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*Gober* and *Peterson* requires reversal of the convictions in these cases, we believe that a similar result should follow in *Acant*. Such a reversal in *Acant* would avoid consideration of any new constitutional issues not already decided in *Gober* and *Peterson*.

If this Court should conclude that it ought not take judicial notice of the Durham ordinance in deciding the case on the merits and that the constitutional issues raised, absent the ordinance, go substantially beyond anything required to be decided in the companion cases, it may wish to consider two other dispositions of the *Acant* case. One would be to remand the case to the Supreme Court of North Carolina for further consideration in the light of the decisions in any cases in which the segregation ordinances were given decisive significance. That court's rule with respect to judicial notice (see *Fulghum v. Town of Selma*, 238 N.C. 100, 76 S.E. 2d 368, 371; *State v. Clyburn*, 247 N.C. 455, 101 S.E. 2d 295, 300) might properly be affected by awareness of possible constitutional implications. And this Court has authority to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. 2106. The other course would be to consider whether the writ was providently granted in the *Acant* case. The well-established practice of refusing to decide difficult constitutional issues upon an inadequate record or in cases that do not require their decision would seem equally applicable to cases in which the constitutional issue is raised only because one of the parties failed to take advantage of another available defense. Cf. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70.

A. A MUNICIPAL ORDINANCE WHICH REQUIRES RACIAL SEGREGATION  
IN RESTAURANTS VIOLATES THE FOURTEENTH AMENDMENT

The municipal ordinances involved in these cases are clearly unconstitutional. It is a fundamental principle of our constitutional system that the Fourteenth Amendment prohibits state-sanctioned racial segregation. This principle was recently applied to restaurants in *Turner v. City of Memphis*, 369 U.S. 350. There, a statute authorized the State Division of Hotel and Restaurant Inspection of the State Department of Conservation to issue "such rules and regulations \* \* \* as may be necessary pertaining to the safety and/or sanitation of hotels and restaurants \* \* \*" and made violation of such regulations a misdemeanor (*id.* at 351). The resulting regulation provided that "[r]estaurants catering to both white and negro patrons should be arranged so that each race is properly segregated" (*ibid.*). This Court left no doubt that such State-required racial discrimination was unconstitutional, stating (*id.* at 353):

\* \* \* our decisions have foreclosed any possible contention that such a statute or regulation may stand consistently with the Fourteenth Amendment. *Brown v. Board of Education*, 347 U.S. 483; *Mayor & City Council v. Dawson*, 350 U.S. 877; *Holmes v. City of Atlanta*, 350 U.S. 879; *Gayle v. Browder*, 352 U.S. 903; *New Orleans City Park Improvement Assn v. Detiege*, 358 U.S. 54. \* \* \*

See also *Bailey v. Patterson*, 369 U.S. 31; *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *Morgan v. Virginia*, 328 U.S. 373; *Baldwin v. Morgan*, 287 F. 2d 750 (C.A. 5).

**B. THE STATE IS RESPONSIBLE FOR THE DECISION OF THE OWNERS OF A RESTAURANT TO DISCRIMINATE ON THE BASIS OF RACE WHEN THIS DECISION IS COMPELLED BY STATE LAW**

1. If the owner of an establishment requests Negroes to leave a lunch counter reserved for whites because a State law requires the owner to maintain segregation, the prosecution of Negroes for criminal trespass for refusing to leave would be an implementation of the discriminatory State statute and would therefore violate the equal protection clause of the Fourteenth Amendment. While this Court has apparently never had occasion to pass directly upon the question, the lower courts have so held. Thus, in *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845, 847, the Court of Appeals for the Fourth Circuit indicated that "actions \* \* \* performed in obedience to some positive provision of state law" acquire the coloration of the State and are governed by the broad egalitarian requirements of the Fourteenth Amendment. In *Flemming v. South Carolina Electric and Gas Co.*, 224 F. 2d 752, the Fourth Circuit held that the racial segregation of passengers by a bus company, as required by State law, constituted action under color of State law. Similarly, the Court of Appeals for the Fifth Circuit has held that "[t]he very act of posting and maintaining separate [waiting room] facilities when done by the [railroad] Terminal as commanded by these state orders is action by the state." *Baldwin v. Morgan*, 287 F. 2d 750, 755 (C.A. 5). It declared (*id.* at 756):

\* \* \* the State may not use race or color as the basis for distinction. It may not do so by direct action or through the medium of others

*who are under State compulsion to do so.* \* \* \*  
(Emphasis added.)

See also the earlier *Baldwin v. Morgan* case, 251 F. 2d 780, 789-790 (C.A. 5); *Roman v. Birmingham Transit Co.*, 280 F. 2d 531 (C.A. 5).<sup>28</sup>

The rule enunciated in the above decisions, we believe, is clearly correct. A person who engages in racial discrimination under influence of the State's coercive authority is in no sense acting independently. Rather, he is acting in compliance with the will of the State, and the effect of his action is to carry out the State's policy of discrimination. Consequently, the discriminatory action, while performed by a private person, is a reflection of the State's law and policy. The State has "insinuated itself" into the private decision and "place[d] its authority behind discriminatory treatment based solely on color \* \* \*" in the most forceful manner available to it, by the compulsion of its penal laws. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 727.

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<sup>28</sup> And see *Williams v. Hot Shoppes, Inc.*, 293 F. 2d 835, 845, 846 (C.A. D.C.) (Judges Bazelon and Edwards dissenting):

"If a state statute affirmatively required restaurant owners to segregate their facilities or exclude Negro patrons, conduct of the restaurant owners caused solely by the compulsion of such a statute would be state action and would give rise to a claim for relief under [42 U.S.C.] § 1983. \* \* \* When otherwise private persons or institutions are required by law to enforce the declared policy of the state against others, their enforcement of that policy is state action no less than would be enforcement of that policy by a uniformed officer."

The majority opinion in *Hot Shoppes* did not reach this question.



Indeed, if actions compelled by statute are not considered State action, decisions of this Court proscribing State imposed racial segregation (see *supra*, p. 48) may be largely circumvented. For the result is that State laws compelling private persons or organizations to discriminate are enforced through parallel statutes—like the trespass and criminal mischief statutes involved here. It may be argued that no businessman is bound to discriminate because, if he disobeys a State law which commands discrimination, he can challenge the constitutionality of the statute under which he has been convicted—if need be, in this Court. But a criminal law, with the power of the State behind it, has, until it is repealed, a powerful effect of its own. Ordinary citizens do not know that a particular law is not enforced or is unconstitutional, and, even if they know, they do not lightly disregard it. In any event, regardless of the number of people who act under compulsion of a State segregation statute which is unconstitutional and therefore unenforceable, certainly in the case of those who do respond to the compulsion the consequence is an implementation of the statutory command. The use of the State's criminal law to arrest and convict Negroes for activities which, except for unconstitutional State segregation statutes, would be entirely legal—because the restaurateur would not discriminate—is surely unconstitutional.

2. We have shown that, if a restaurateur excludes Negroes because of a State statute, the State cannot convict Negroes for trespass for entering the restau-

rant. In none of these cases, we recognize, does the record contain an express and specific affirmative showing that the coercive force of the segregation ordinance was the sole reason for the proprietor's refusal to serve the various petitioners. In *Peterson* the proprietor testified that he refused service because of local custom and the segregation ordinance of Greenville. In *Arent* the ordinance is not mentioned in the record, but the manager acted in accordance with local custom and for reasons of "public safety." The *Gober* case presents five pairs of convictions. Petitioners *Gober* and *Davis* were excluded because the proprietor felt that it would be against the law to serve them. The records in the four other trials in the *Gober* case do not record the motivation of the various proprietors.<sup>39</sup> In *Shuttlesworth*, the petitioners were convicted of aiding and abetting the violations of the trespass statute involved in the *Gober* case. Under Alabama law, as stated by the Alabama Court of Appeals in this case, the validity

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<sup>39</sup> In the *Gober-Davis* trial, petitioners' attempt to secure further evidence concerning the relationship of the ordinance and the decision to discriminate was foreclosed by the rulings of the trial court that this line of inquiry was incompetent (see the Statement, *supra*, pp. 29-30). Since *Gober-Davis* was the first of a series of five trials before the same state trial judge, further efforts in the four later cases to raise the same issue would have been futile, as is shown by the court's ruling in *Parker-West* that a similar line of inquiry was impermissible. Thus, while no effort was made in the *Hutchinson-King*, *Sanders-Westmoreland*, or *Walker-Willis* trials to raise an issue concerning the segregation ordinance, it is fair to say that all the petitioners in *Gober* were denied an opportunity to show that the restaurateurs' decisions to discriminate were based on the Birmingham ordinance.

of the convictions depends on whether they were inciting persons to commit a crime. There is no evidence in the *Shuttlesworth* record as to the motivations of the proprietors of the establishments where the "sitting-in" occurred.

Upon each of these records the only permissible inference is that the local ordinance was such a substantial factor in the proprietor's decision that the State must share in the responsibility for the discrimination to the same extent as if the record showed that the decision of the restaurateurs to discriminate was based solely upon State law. It is not necessary that the discrimination be solely the result of the State's activities. It is enough that the State in any of its manifestations has become involved in the discrimination. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722. See also pp. 59-63 *infra*.

We base our submission that the only permissible inference upon these records is one of substantial State responsibility for the proprietor's discrimination upon three lines of reasoning.

*First*, where State law requires racial segregation in all eating places and the proprietors uniformly comply, the average individual proprietor would never reach the question whether he would discriminate if left to a judgment uninfluenced by the State; and this seems true whether the owner is conscious or unconscious of the reasons for his conduct. The normal inference to be drawn from the existence of the ordinance, therefore, is that it caused the discrimination, and the State would then have to overcome the infer-

ence by showing that the decisions of the proprietors were wholly uninfluenced by the compulsion of an existing State law.

*Second*, to the extent that the records in these cases are unclear as to the motivation of the proprietors, the States had the burden of removing the ambiguity because the States themselves created it. It is a familiar principle of general applicability in our law that the party responsible for a wrong must "disentangle the consequences for which it was chargeable" or bear the responsibility for the whole. *National Labor Relations Board v. Remington Rand Inc.*, 94 F. 2d 862, 872. The question whether the restaurateurs were moved to act as they did because of the coercive effect of the segregation statutes would not exist except for the fact that the States passed and retained statutes which compel racial segregation and therefore violate the Fourteenth Amendment. It is clear, as we have seen, that if the proprietor discriminates as a result of the compulsion of the State, this constitutes State action. On the face of it, the decisions of the restaurateurs to discriminate were made under compulsion of explicit State statutes. Assuming that a State would be heard to deny the coercive effect of its own ordinance, there is no showing in any of these cases that the State did not cause the exclusionary act of the proprietor. In each instance, therefore, the State has failed to establish an element essential to the constitutionality of the conviction.

*Third*, even if the States had shown that the proprietor's decision to discriminate was not caused by the compulsion of the municipal ordinances, these

convictions would have to be deemed invalid because it was not also made to appear that the petitioners knew that the proprietor's decision was a purely private choice. Where discrimination appears on its face to be invalid under the Fourteenth Amendment because it is compelled by a State law, Negroes should not be required to investigate the true motive of the restaurateur before entering the premises. In *Boydton v. Virginia*, 364 U.S. 454, this Court held that the Interstate Commerce Act forbids racial segregation of a restaurant in a bus terminal. A contention was made that there was no proof that the bus company owned or controlled the bus terminal or restaurant in it. The Court answered that "where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers \* \* \*, an interstate passenger need not inquire into documents of title or contractual arrangements in order to determine whether he has a right to be served without discrimination." *Id.* at 462-464. Thus, the Court held in *Boydton* that a Negro who is being discriminated against need not inquire into the precise facts when it appears that the discrimination violates the Interstate Commerce Act. It follows *a fortiori* that where, as in these cases, discrimination against Negroes on its face appears to violate the Fourteenth Amendment, the Negro need not ascertain the motives of the owner at the risk of suffering criminal sanctions.

If Negroes were required to ascertain the actual motives of the proprietors before seeking service at lunch counters or entering lunch rooms, their rights under the Fourteenth Amendment would be seriously abridged. These motives are frequently difficult, if not impossible, to ascertain, at the time the Negro desires service in a particular restaurant, especially when, as in most of these cases, chain stores are involved.<sup>10</sup> The situation is analogous to that in First Amendment cases where this Court has held that the State cannot pass statutes which, because of vagueness, or the burden of proof, or the lack of any requirement of scienter, have the indirect effect of discouraging freedom of speech even though in the particular case no protected right may have been invaded. *E.g., Smith v. California*, 361 U.S. 147; *Speiser v. Randall*, 357 U.S. 513; *Thornhill v. Alabama*, 310 U.S. 88; *Winters v. New York*, 333 U.S. 507; *Wieman v. Updegraff*, 344 U.S. 183. In these cases, too, the effect of the State convictions is to discourage the assertion of constitutional rights since the petitioners were not given notice of the facts necessary to determine whether their actions were constitutionally protected.

In the present cases it is unnecessary, we think, to go farther and consider whether the presumption that a State law requiring segregation in eating

<sup>10</sup> Negroes, it appears, are invited into these stores, and in other respects their trade is solicited on a non-discriminatory basis.

places has played a significant part in the proprietor's decision can be overcome by testimony that the proprietor would have enforced segregation even if there were no current statute or ordinance. It can be argued with considerable force that a private person should not lose a power of choice which is otherwise his merely because the State or municipality has acted in an unconstitutional manner. We would submit, however, if the question had to be decided, that, whatever may be the right of a proprietor to assert in private litigation that his decision to segregate is the result of private choice rather than the State's command, the State cannot justify the prosecution as consistent with the Fourteenth Amendment upon the ground that its command directing segregation had no effective influence upon the proprietor, the police or the public prosecutor. In a criminal prosecution one cannot put the segregation statute or ordinance, the proprietor's decision and the prosecution for trespass in separate compartments. The order to segregate is too inconsistent with freedom of choice and the ways in which its existence may influence proprietors' decisions are too varied and too subtle to permit a State to defend a criminal prosecution which enforces racial segregation, upon the ground that the segregation resulted from private choice, unless the State has actually left both choices entirely open to proprietors.

The segregation ordinances are also related to petitioners' convictions for criminal trespass by another tie. The police normally exercise considerable dis-



cretion in their method of handling citizens' complaints about infractions of minor criminal laws such as the trespass statutes. Prosecutors have and exercise similar latitude in deciding whether to institute criminal proceedings; and the judge has wide discretion in his disposition of the case. A State which has current laws requiring racial segregation in public eating places interjects an official discriminatory bias into all these decisions which is certainly relevant in deciding whether a prosecution for criminal trespass is so closely related to the discriminatory ordinances as to be part and parcel of the same State denial of equal protection of the laws.

## II

ALTHOUGH IN THE LOUISIANA CASE THE STATE ADDRESSED NO EXPLICIT STATUTORY COMMAND TO RESTAURATEURS, AS SUCH, TO SEGREGATE THEIR CUSTOMERS, IT APPEARS THAT THE STATE, BY ITS POLICIES AND BY ITS LAWS IN CLOSELY RELATED AREAS, EFFECTIVELY INDUCED THE PROPRIETOR'S ACTS OF DISCRIMINATION. SINCE THE CASE DOES NOT PERMIT A FINDING THAT THE PROPRIETOR WAS MERELY MAKING A PRIVATE DECISION UNINFLUENCED BY OFFICIAL PRESSURE, THE STATE IS CONSTITUTIONALLY FORBIDDEN TO IMPOSE CRIMINAL SANCTIONS WHICH IMPLEMENT THE DISCRIMINATION.

A. The argument just concluded advances the proposition that when a State expresses its policy by issuing a specific statutory command to segregate it bears a heavy responsibility for discriminatory conduct which conforms to the State's requirement and cannot be permitted to compound the injustice by imposing criminal sanctions upon the victims of the

discrimination. The question presented in *Lombard v. Louisiana* is whether the same principle governs when the State's segregation policy is not embodied in an explicit statutory directive in terms requiring the proprietor of the particular establishment to discriminate against Negroes, but is, nonetheless, forcibly expressed and plainly evident in legislative declarations, laws in closely related areas, statements of public officials, and a long standing community-wide custom fostered and encouraged by the State.

We submit the same rule applies. For, in the absence of any contrary proof, in the latter case like the former it must be concluded that the exclusion of the Negro is the result of State policy rather than an unfettered individual decision. Notwithstanding the unsupported opinion of the Louisiana Supreme Court to the contrary (L. 146, 147, 148), an examination of the State and City policies and laws, together with the facts disclosed by the record, leads to the conclusion that Louisiana induced the acts of discrimination which support the prosecutions in *Lombard*; hence we submit these convictions are as invalid as those in the other cases.

To illustrate our point, we need go no further than the actual facts. Suppose, if you will, a State which, through its legislature, has proclaimed an overriding State policy of segregation; a State which, in pursuance of this policy, has enacted a panoply of prohibitions designed to inhibit contact between the races; a State which has vigorously and persistently enforced these prohibitions; a State which,

through the acts, conduct and statements of its public officials, has placed continuing stress upon the proposition that segregation is the required way of life; a State which, by the force of law and policy, brought to bear over the course of many decades and still continuing, has established a community-wide custom of segregation reaching virtually into every department of life. Suppose further that, though no specific enactment explicitly requires it, segregation is in fact uniformly practiced in public restaurants, in full conformity with the State's open and declared policies and with its encouragement and support. In these circumstances, does the absence of an express statutory command justify the conclusion that the State's prosecution of Negroes who seek to be served food despite the discriminatory practices followed by the proprietors of such an establishment is neutral and "color-blind"? Or, at least in the absence of a strong showing to the contrary, is one not driven, rather, to the conclusion that the State can not disclaim a measure of responsibility for the discrimination which it now seeks to implement through criminal sanctions?

Common sense requires an affirmative answer. Nor does this result call for the adoption of novel principles of law.

We begin with one certainty. The absence of an explicit statutory command does not foreclose the search for State action. The Fourteenth Amendment is not so narrowly confined. Just as the State acts in many other ways, so the Amendment looks

beyond the formal enactments of the State legislature. It notices State action in the rulings of judges, *Ex Parte Virginia*, 100 U.S. 339; *Shelley v. Kraemer*, 334 U.S. 1, in the edicts of governors, *Sterling v. Constantine*, 287 U.S. 378; *Cooper v. Aaron*, 358 U.S. 1; *Faubus v. Aaron*, 361 U.S. 197, affirming 173 F. Supp. 944, and in the decisions of all manner of subordinate local officials. *Virginia v. Rives*, 100 U.S. 313, 321; *Yick Wo v. Hopkins*, 118 U.S. 356; *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278; *Niemotko v. Maryland*, 340 U.S. 268; *Pennsylvania v. Board of Trusts*, 353 U.S. 230; *Cooper v. Aaron*, *supra*. And, as the cases just cited make plain, discrimination by State officers is no less prohibited because it is accomplished without, or despite, the command of statutory law. See *Monroe v. Pape*, 365 U.S. 167, 171-172.

But the Amendment does not reach "official" acts only. The State is not insulated merely because the result is accomplished through persons interposed, however, "private" they may claim to be. The State can no more dictate discrimination in private institutions than it can segregate its own facilities. *Truax v. Raich*, 239 U.S. 33; *Buchanan v. Warley*, 245 U.S. 60; *Gayle v. Browder*, 352 U.S. 903, affirming 142 F. Supp. 707; *State Athletic Commission v. Dorsey*, 359 U.S. 533, affirming 168 F. Supp. 149; *Bailey v. Patterson*, 369 U.S. 31, 33; *Turner v. City of Memphis*, 369 U.S. 350. The constitutional right to equal treatment "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly \* \* \*". *Cooper v. Aaron*, *supra*, 358 U.S. at 17. Nor is it only when the State

explicitly dictates discrimination by others that their conduct "may fairly be said to be that of the States." *Shelley v. Kramer*, *supra*, 334 U.S. at 13. See *Nixon v. Condon*, 286 U.S. 73; *Smith v. Allwright*, 321 U.S. 649; *Terry v. Adams*, 345 U.S. 461. State "participation", "whether attempted 'ingeniously or ingeniously,' " or "insinuation" in discriminatory activity is just as real when its involvement is "nonobvious." *Cooper v. Aaron*, *supra*, 358 U.S. at 4, 17; *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725. Cf. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451.<sup>41</sup> And, again, it does not matter through what branch of government, or whether formally or informally, the State encourages segregation by others. *Cooper v. Aaron*, *supra*, 358 U.S. at 17; *Terry v. Adams*, *supra*, 345 U.S. at 475 (opinion of Mr. Justice Frankfurter); *Barrows v. Jackson*, 346 U.S. 249, 254. As stated by this Court many years ago, "the prohibitions of the Fourteenth Amendment \* \* \* have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes

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<sup>41</sup> See, also, *Muir v. Louisville Park Theatrical Association*, 347 U.S. 971, reversing and remanding 202 F. 2d 275; *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F. 2d 212 (C.A. 4); *Department of Conservation & Development v. Tate*, 231 F. 2d 615 (C.A. 4); *City of St. Petersburg v. Alsup*, 238 F. 2d 830 (C.A. 5); *Derrington v. Plummer*, 240 F. 2d 922 (C.A. 5); *City of Greensboro v. Simkins*, 246 F. 2d 425 (C.A. 4); *Baldwin v. Morgan*, 287 F. 2d 750 (C.A. 5); *Lawrence v. Hancock*, 76 F. Supp. 1004 (S.D.W.Va.); *Jones v. Marva Theatres, Inc.*, 180 F. Supp. 49 (D.Md.); *Coke v. City of Atlanta, Ga.*, 184 F. Supp. 579 (N.D.Ga.). And see *Valle v. Stengel*, 176 F. 2d 697 (C.A. 3).

that action may be taken." *Ex Parte Virginia*, *supra*, 100 U.S. at 346-347.

The cases just cited, although they do not resolve the present issue, show the breadth of the concept of State action, which, as Mr. Justice Clark pointed out in *Barton v. Wilmington Parking Authority*, 365 U.S. 715, 721-722, has from the day of the *Civil Rights* cases until *Cooper v. Aaron* embraced "State action of every kind \* \* \* which denies \* \* \* the equal protection of the laws" (109 U.S. at 11) and also "state participation through any arrangement, management, funds or property" (358 U.S. at 4). So long as the State has meaningfully "place[d] its authority behind discriminatory treatment based solely on color [it] is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment." *Barton v. Wilmington Parking Authority*, *supra*, 365 U.S. at 727 (dissenting opinion of Mr. Justice Frankfurter).

In short, the State is not insulated from responsibility under the Fourteenth Amendment merely because a private person commits the final act of invidious discrimination. The question, as Mr. Justice Clark has pointed out for the Court, is whether the State in any of its manifestations has, to some significant extent, become involved in the discrimination. *Barton v. Wilmington Parking Authority*, 365 U.S. 715, 722.

B. In light of these principles, we consider whether the act of discrimination which lies at the base of the prosecution of the petitioners in *Lombard* can be said to be "private", rather than State-induced.

1. The segregationist policy of Louisiana is reflected in its laws. The scheme is not haphazard. Almost every activity is segregated. Discrimination against the Negro literally begins with his birth and continues to his death, and beyond.

At the outset, the Negro is given a birth certificate which so identifies him. La. R.S. 40:244. He starts life on a segregated street. La. 33:5066-5068. See also, La. R.S. 33:4771. As a child he is segregated in parks, playgrounds, swimming pools, and other recreational activities. La. R.S. 33:4558.1. If taken to the circus, he must go in by a separate entrance. La. R.S. 4:5. Until very recently, he was relegated to all-Negro public schools. Former La. R.S. 17:331-334, 17:341-344 (repealed in 1960).<sup>42</sup> Even now, he may attend a segregated school in the upper grades. See *Orleans Parish School Board v. Bush*, August 6, 1962 (C.A. 5). Later on, he will be compelled to stay apart at all entertainments and athletic contests. La. R.S. 4:452. Mixed social functions are absolutely banned. La. R.S. 4:451. At work, he will eat separately and use separate sanitary facilities. La. R.S. 23:971-975. His voting registration is separately tabulated. La. R.S. 18:195. And, should he become a candidate for elective office, he will be identified by race on the ballot. La. R.S. 18:1174.1. He may not marry outside

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<sup>42</sup> Despite the contrary rulings of the federal courts the statute books of Louisiana are not yet wiped clean of provisions designed to forestall effective desegregation of the public schools. See, e.g., La. R.S. 17:197, 17:394.1, 17:395.1-4, 17:2801, *et seq.*, 17:2901, *et seq.*



of his race. La. Civil Code, Art. 94; La. R.S. 9:201. See, also, La. R.S. 14:79. If he is divorced, the court proceedings will reflect his color. La. R.S. 13:917, 13:1219.

Institutions for the blind and deaf are segregated. La. R.S. 17:10-12. So are homes for the aged and infirm. La. R.S. 46:181. And prisons also separate the races. La. R.S. 15:752, 15:854. See, also, La. R.S. 15:1011, 15:1031.

Finally, his death will be attested by a certificate identifying him by race. La. R.S. 40:246. And he will be buried, presumably in a segregated cemetery,<sup>41</sup> perhaps under a funeral policy which has been separately administered. La. R.S. 22:337, 22:345.

Significantly, in this pervasive scheme of segregation, there seems to be special emphasis on separate consumption of food and drink. Employers are required to segregate their employees during meals, even to the point of supplying different utensils for each race. La. R.S. 23:972. Likewise, at all places of public entertainment, separate water fountains must be provided. La. R.S. 4:452. And, in New Orleans at least, strict segregation is required in all establishments which serve beverages with more than one-half of 1 percent alcohol. New Orleans City Code, §§ 5-2(1), 5-61.1. All appearances suggest that the leg-

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<sup>41</sup> While there appears to be no specific statute segregating cemeteries, the practice seems to be required, at least in all publicly owned cemeteries, by the recent constitutional provision compelling segregation in all State, parochial or municipal institutions. See La. Const. 1921, Art. X, § 5.1, as added by Act 630 of 1960, adopted November 8, 1960.

islative policy of Louisiana includes segregation of public restaurants and lunch counters.

The statute books give no false impression. While compulsory segregation is far from new in Louisiana, neither are the present laws mere vestiges of a forgotten past. Many of the statutes are recent. None are ignored as obsolete. On the contrary, what remained of a more generous era (see *Hall v. DeCuir*, 95 U.S. 485) was quickly erased from the books. One relevant example is the repeal in 1954, shortly after this Court's initial decision in *Brown v. Board of Education*, 347 U.S. 483, of the local "inkeeper" statute and a companion provision specifically banning "distinction or discrimination on account of race or color" in licensed "places of public resort." See former La. R.S. 4:3-4, repealed by Act 194 of 1954.

Where the State's segregation policy has given away, it has been almost invariably under the compulsion of federal court orders, and then only after most protracted litigation. See *Wilson v. Board of Supervisors*, 92 F. Supp. 986 (E.D. La.), affirmed, 340 U.S. 909 (State law school); *Tureaud v. Board of Supervisors*, 116 F. Supp. 248 (E.D. La.), reversed, 207 F. 2d 807, judgment of court of appeals stayed, 346 U.S. 881, vacated and remanded, 347 U.S. 971, affirmed, 225 F. 2d 434, reversed and remanded on rehearing, 226 F. 2d 714, affirmed on further rehearing *en banc*, 228 F. 2d 895, certiorari denied, 351 U.S. 924 (State undergraduate and law school); *Morrison v. Davis*, 252 F. 2d 102 (C.A. 5), certiorari

denied, 356 U.S. 968, rehearing denied, 357 U.S. 944 (Buses and streetcars); *New Orleans City Park Improvement Ass'n v. Detiege*, 252 F. 2d 122 (C.A. 5), affirmed, 358 U.S. 54 (Municipal park); *Ludley v. Board of Supervisors of L.S.U.*, 150 F. Supp. 900 (E.D. La.), affirmed, 252 F. 2d 372, certiorari denied, 358 U.S. 819 (State colleges); *Dorsey v. State Athletic Commission*, 168 F. Supp. 149 (E.D. La.), affirmed, 359 U.S. 533 (Interracial sports contests); *Board of Supervisors of Louisiana State U. v. Fleming*, 265 F. 2d 736 (C.A. 5); (State university); *Louisiana State Board of Education v. Allen*, 287 F. 2d 32 (C.A. 5), certiorari denied, 368 U.S. 830 (State trade school); *St. Helena Parish School Board v. Hall*, 287 F. 2d 376 (C.A. 5), certiorari denied, 368 U.S. 830, further relief granted, 197 F. Supp. 649, affirmed, 368 U.S. 515 (Public schools); *East Baton Rouge Parish School Board v. Davis*, 287 F. 2d 380 (C.A. 5), certiorari denied, 368 U.S. 831 (Public schools). This Court is, of course, familiar with the course of the litigation involving the public schools of New Orleans. See *Bush v. Orleans Parish School Board*, 138 F. Supp. 337 (E.D. La.), leave to file mandamus denied, 351 U.S. 948, affirmed, 242 F. 2d 156, certiorari denied, 354 U.S. 921, denial of motion to vacate affirmed, 252 F. 2d 253, certiorari denied, 356 U.S. 969, further motion to vacate denied, 163 F. Supp. 701, affirmed, 268 F. 2d 78; *id.*, 187 F. Supp. 42, stay denied, 364 U.S. 803, affirmed, 365 U.S. 569; *id.*, 188 F. Supp. 916, stay denied, 364 U.S. 500, affirmed, 365 U.S. 569; *id.*, 190 F. Supp. 861, affirmed,

366 U.S. 212; *id.*, 191 F. Supp. 871, affirmed, 367 U.S. 908; *id.*, 194 F. Supp. 182, affirmed, 367 U.S. 907, 368 U.S. 11; *id.*, 204 F. Supp., 568, modified, 205 F. Supp. 893, modified and affirmed (C.A. 5), August 6, 1962.

As the State Legislature recently proclaimed, not only has Louisiana "always maintained a policy of segregation of the races," but "it is the intention of the citizens of this sovereign state that such a policy be continued." La. Act 630 of 1960, Preamble.

2. The statute books tell only a part of the story. Louisiana has a long tradition of racial discrimination, as is attested by the cases which have reached this Court. See, in addition to the cases already cited and those cited, *infra*, p. 70, *United States v. Cruikshank*, 92 U.S. 542; *Plessy v. Ferguson*, 163 U.S. 537; *Harmon v. Tyler*, 273 U.S. 668; "*Pierre v. Louisiana*, 306 U.S. 354; *Louisiana v. N.A.A.C.P.*, 366 U.S. 293. Even in areas where there is no specific statute, the custom of segregation persists. And, of course, customs often have a force akin to law. *Civil Rights Cases*, 109 U.S. 3, 16, 21; *Terry v. Adams*,

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"Louisiana's reluctance to abandon its tradition of segregation, even where this Court has ruled, is exemplified by the retention of the provision banning mixed communities in the 1950 codification of the laws still in effect, long after this Court's declaration that the statute was unconstitutional in *Harmon v. Tyler*. The Reporter for the revision notes that, since "[t]he state supreme court in its opinion [upholding the statute] had carefully distinguished or attempted to distinguish, the *Buchanan* case [*Buchanan v. Warley*, 245 U.S. 60, relied on by this Court]," and since this Court's ruling was "only a memorandum decision," the provision should be retained as still in force. See "Reporter's Notes" to La. R.S. 33:5066.

*supra*, 345 U.S. at 475 (opinion of Mr. Justice Frankfurter). Indeed, the Louisiana criminal courts are expressly enjoined to take judicial notice of extra-legal racial customs, presumably because they have legal relevance. See La. R.S. 15:422(6).

Specifically, a strict practice of segregation prevails in the service of food. As Mr. Justice Douglas noted in *Garner v. Louisiana*, 368 U.S. 157, 181 (concurring opinion):

Though there may have been no state law or municipal ordinance that *in terms* required segregation of the races in restaurants, it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana's custom. Segregation is basic to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law. \* \* \*

The custom had not changed when the present "sit-in" occurred. Both the Mayor and Police Superintendent of New Orleans frankly stated that they knew of no desegregated restaurant in the City.<sup>45</sup>

But segregation in restaurants is no mere *private* custom. If it were, it would doubtless have long since ceased to be the uniform practice. See *Cooper v.*

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<sup>45</sup> We understand that since the granting of the petition in *Lombard* several department stores in New Orleans have desegregated their lunch counters. Of course, the partial desegregation of eating establishments at the present time does not disclose the situation when the discrimination at the base of these prosecutions occurred, two years earlier.

*Aaron, supra*, 358 U.S. at 20-21, 25, 26 (concurring opinion of Mr. Justice Frankfurter). It is actively supported by the outspoken policies of the State—policies so hardened that State employees are enjoined from advocating integration under penalty of losing their jobs. See La. R.S. 17:443, 17:462, 17:493, 17:523.

The State itself, apart from the enactment of compulsory legislation, sets the example. It segregates all of its own facilities. La. Const. 1921, Art. X, as amended 1960, § 5.1. It continues to discriminate in the electoral process. See *United States v. McElveen*, 180 F. Supp. 10 (E.D. La.), affirmed *sub nom. United States v. Thomas*, 362 U.S. 58; *United States v. Association of Citizens Councils of Louisiana*, 196 F. Supp. 908 (W.D. La.); *United States v. Manning*, 205 F. Supp. 172 (W.D. La.). See, also, *Hannah v. Larche*, 363 U.S. 420. Despite decisions in this Court, beginning with *Strauder v. West Virginia*, 100 U.S. 303, discrimination in grand jury selection persisted in New Orleans until at least 1954. See *Eubanks v. Louisiana*, 356 U.S. 584, 586. See, also, *Poret v. Sigler*, 361 U.S. 375. And efforts by Negroes to challenge segregation customs have been promptly met with prosecutions for breach of the peace. *Garner v. Louisiana*, 368 U.S. 157 (lunch counter customarily reserved for whites); *Taylor v. Louisiana*, 370 U.S. 154 (terminal waiting room customarily reserved for whites).

3. As indicated above, the inference that the State government causes and sustains the practice of segre-

gation in Louisiana restaurants seems unavoidable. In this instance, there were additional pressures by local officials.

Although the former New Orleans Mayor and the Superintendent of Police are men of moderation, whose utterances were restrained, their statements, quoted in full at pp. 12-15, *supra*, could not but harden the opposition to desegregation of lunch counters in the City. The timing of these official declarations was crucial.

It appears that, one week prior to the "sit-ins" here involved, the Superintendent of Police issued a public statement (*supra*, pp. 12-13), reprinted in the city's leading newspaper, which, in the context of Louisiana's laws and customs, must have been understood to condemn the efforts of the city's Negro citizens to achieve equality of treatment at lunch counter facilities not only by demonstrations but by any means. Terming the first "sit-ins" to have occurred in New Orleans "regrettable," the Superintendent claimed they were instigated by a "very small group" which did "not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population." The Superintendent appealed to "mature responsible citizens of both races" to "exercise \* \* \* sound, individual judgment, goodwill and a sense of personal and community responsibility." Parents of the demonstrators were asked "to urge upon these young people that such actions are not in the community interest." Perhaps most significant, the Superintendent



ent saw "no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans." In the existing environment this exhortation can hardly have been understood to be confined to illegal demonstrations; it obviously supported the notion that proprietors should continue to refuse service to Negroes, for the normal traditional pattern of race relations with respect to food service, as the Mayor and Superintendent testified, was that proprietors would not serve Negroes on an integrated basis.

Four days prior to the "sit-ins," the Superintendent's statement was buttressed by a statement issued by the Mayor (*supra*, pp. 13-15) also published in the press. The Mayor declared that he had "directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted." This command was not restricted to demonstrations involving refusals to leave after being requested to do so. It acknowledged no room for free private decisions by the owners of lunch counters, no opportunity for Negroes to seek service in the hope that the owners would abandon segregation. It was also a direct prohibition upon lawful peaceful picketing (Cf. *Thornhill v. Alabama*, 310 U.S. 88) designed to encourage proprietors to serve Negroes on an integrated basis. The Mayor stated that he would enforce his directions by invoking two recent enactments of the State legislature prohibiting acts which could "foreseeably disturb or alarm the

public." Finally, he demanded that "such demonstrations cease" in the "community interest."

The foregoing statements read in isolation might fairly be construed to deal only with "sit-in" demonstrations. However, their combined effect in the Louisiana context, we submit, was not only to discourage "sit-ins" but to condemn the goal of equality of service and any activity intended to persuade the proprietors of public eating-places to cease segregation. Their impact upon those who might otherwise have acceded to the demands for equality of treatment seems plain.

4. We return to the question whether the total body of State influences—the manifold current segregation laws and contemporaneous declarations of policy, the customs stemming therefrom and the declarations of the mayor and chief of police—should be found to have played the same decisive role in the proprietors' discrimination against petitioners Lombard *et al.* as the municipal ordinances were seen to play in the companion cases previously discussed. See pp. 50–59 *supra*. The situations differ in that the Louisiana laws did not literally require the segregation. They are the same in that on this record one can only conclude that Louisiana's official actions must have been effective inducing causes of the proprietor's choice. Under these circumstances, too, normal human experience teaches that the individual proprietor would never face the problem of forming a judgment uninfluenced by State policy. The State which enacts unconstitutionally discriminatory laws in areas so

closely related to segregation in public eating-places and which declares generally that racial segregation is the policy of the State has the same burden of disentangling its influence upon the proprietors' discrimination from other factors for which the State is not responsible. And there is the same burden to show petitioners' awareness that the segregation was the result of the proprietor's individual choice uninfluenced by State action, if indeed that were the truth.

In the present case, we are not left merely to inference and presumption. Far from overcoming the conclusion that the exclusionary practice stemmed from the State, the testimony of the store manager confirmed it. Although his testimony on this subject was curtailed at the trial (see *supra*, pp. 17-19), the manager pointedly declared (*supra*, pp. 16-17) that he refused petitioners service because of "local tradition, law and custom."

Louisiana's official segregation policies are also related to petitioners' convictions for criminal trespass by their inevitable effect upon the police, the prosecutors and the State courts. Louisiana's policy, like the segregation-in-public-eating-places ordinances discussed at pages 49-59 *supra*, interjected an official discriminatory bias into the decisions of the police in the handling of complaints, into the decision of the prosecutor as to whether to institute criminal proceedings and, quite possibly, into the sentence. This impact of the segregation policies in the criminal proceeding confirms our conclusion that the convictions violate

the Fourteenth Amendment because on these records they are inseparably part of the official State policy of denying Negroes equal protection of the laws.

In the present case, it is unnecessary to consider just how large a body of State laws would justify finding, in the absence of contrary proof, that the State is so involved in the proprietor's decision that it is barred from initiating a prosecution for criminal trespass. Each particular case must be individually decided by making a judgment upon the question of degree, and the smaller the body of State law the closer the case will fall to the dividing line. In the *Lombard* case the Louisiana statutes are current and the general State policy of segregation was declared by the legislature as recently as 1960. The problem that would arise if the statutes had been repealed and the private discrimination were only the result of community customs promoted by earlier State laws does not require consideration here. The currency and pervasiveness of the body of Louisiana's segregation laws and the plainness with which that policy is declared show that this case is well on the unconstitutional side of the dividing line.

5. We have argued above that the record utterly fails to overcome the strong inference that the proprietor's acts of discrimination were brought about by the State. Although the Louisiana Supreme Court has stated in its opinion (L. 147) that the decision to exclude Negroes was independently made by the store owner, we find no supporting evidence for this conclusion. The manager did testify that, so far as the

national chain was concerned, the determination was left to him. And, obviously, it was he who actually established the segregated eating accommodations and maintained them separate. But the courts below gloss over the manager's explanation why he acted as he did. So far as he was permitted to explain, he said he was following prevailing "local tradition, law and custom," as he interpreted it. Further cross-examination on this point was cut off. Clearly, this statement does not support the conclusion that he made a purely private decision.

We think this evidence unambiguous against the background already sketched. For, as we have said, having intruded so actively and so pervasively in the area of race relations, the State had to overcome the presumption that it participated in the act of discrimination at the base of these prosecutions. And, certainly, Louisiana has not met that burden, at the trial or elsewhere. But the result here would not be different if the Court should disagree and hold that the shoe was on the other foot. For, if petitioners bore the burden of proving the State's involvement, they were at least entitled to an opportunity to make that showing. And, if they have failed to satisfy this Court, it is only because their efforts in this direction were summarily cut short.

As the court below confirms, petitioners "sought to introduce evidence to establish that the action of the manager of McCrory's was provoked or encouraged by the state, its policy, or officers \* \* \*" (L. 146). But the trial court refused that evidence. To cite one example, during the questioning of the store manager,

petitioners' counsel asked: "Will you tell the court why you were not allowed to serve them?" (L. 109). After an objection by the prosecutor was sustained on the ground that the question was not material, defense counsel stated the purpose of his inquiry (L. 110):

I think it is material, because if Mr. Graves [the restaurant manager] felt there was some State policy that prevented him from serving these defendants this is a clear state action. \* \* \*

Nor is this an isolated instance. Consistently, during the preliminary hearing on the motion to quash and during the trial itself, the trial judge prevented inquiry as to why the restaurant discriminated (L. 23, 25, 26, 107, 108, 127-128). The court having imposed upon them the burden of proving the State's involvement, this curtailment of petitioners' attempt to show that the store's decision to discriminate was attributable to the State was clearly improper. It follows that the *Lombard* convictions would have to be reversed even if the burden of showing whether the State's active support of segregation actually influenced the proprietor was upon the petitioners rather than the State.

### III

THE DECISION IN THESE CASES SHOULD NOT BE DETERMINED BY CONSIDERATIONS PERTINENT SOLELY TO RIGHTS AS BETWEEN THE PROPRIETORS AND PETITIONERS

We have considered thus far the issues as between the petitioners and the States, and have shown that upon these records it must be concluded that the

States were sufficiently responsible for the discrimination to make their total action in relation to the petitioners' sentences—the inducement to discriminate plus the prosecution, conviction and sentences—a denial of equal protection of the law. In other words, a State may not, consistently with the Fourteenth Amendment, both induce a proprietor to engage in racial discrimination and prosecute the victims for criminal trespass or a similar offense.

The question may be raised, what are the mutual rights and duties of the petitioners and proprietors in the context of an ordinance requiring, or State action strongly encouraging, racial segregation. It may be argued, in attack upon our position, that reversal upon the grounds we urge would require holding the proprietors to a duty to serve Negroes and denying their private right to exclude them for whatever personal reasons they chose, a result inconsistent with the preservation of the private freedom of choice, sustained in the *Civil Rights Cases* and our ensuing constitutional history. The Negroes' remedy, the argument would conclude, is by direct attack upon the unconstitutional ordinances and official segregation policies rather than the proprietors' private freedom to discriminate.

We believe that this line of inquiry need not be fully explored because a decision in the present cases upon the ground put forward in this brief need not determine the private rights as between proprietors of public eating places and Negroes seeking service.



In the first place, there is no need to decide here whether even a criminal prosecution would violate the Fourteenth Amendment if it were made to appear as a fact that the proprietor's discriminatory practice was not a result of State action but of a personal wish to discriminate which would have been indulged in the absence of the State laws. On the records before the Court, this is not the fact. Obviously, the decision, then, cannot affect rights in private litigation in which the fact is made to appear.

Second, the presumption that the State law has influenced the private decision—a presumption which operates against the State in a criminal prosecution—might not operate in the same fashion against the private owner. The State, having adopted unconstitutional segregation laws, has a duty to disentangle the consequences; it does not lie in the State's mouth, at least in the absence of clear proof, to say that the very discriminatory practices that it ordered or otherwise sought to induce were actually unrelated to the State's directions or encouragement. This reasoning, however, would not run against the individual proprietor and consequently, as between him and the Negro, the outcome of any litigation might be different.

Third, we submit that there is no reason, in the circumstances of these cases, why the ability of the State to prosecute must be exactly the same, both substantively and procedurally, as the right of private owners to refuse service and exclude the Negro who

insists upon service. It is one thing to say that a State which enacts a law requiring segregation in public eating places is guilty of denying Negroes equal protection of the laws not only when it enforces that statute against them, but also when it prosecutes them for criminal trespass because of the decision of those who are apparently obeying the statutory command. That conclusion follows because the segregation laws cannot be so rigidly separated from the criminal prosecution; the prosecution, at least until the contrary is clearly demonstrated, is not only State action but a consequence, and therefore part and parcel, of the concurrent denial of equal protection of the laws. It is quite a different thing, however, to deprive the owner of any property rights which he may independently wish to exercise, on the ground that the State has violated the Fourteenth Amendment. Because of this difference the disposition of these criminal cases need not affect the private rights of proprietors and those seeking restaurant service, and those rights would remain to be determined whenever the issue may arise.

Under the facts of these cases, there is no serious incongruity in suggesting that the proprietors have not necessarily lost their right of action or defense in private suits merely because the State is constitutionally barred from implementing their discrimination through the imposition of criminal sanctions. The problem, if any, is confined within a narrow compass, and it is curable. We espouse no broad

rule of constitutional law which would, in all cases, deny the storeowner who wished to discriminate among customers the aid of the State criminal law. That might be the result if it were held that a State violates the Fourteenth Amendment merely by arresting and prosecuting those who trespass upon segregated premises. But we present no such question. Our contention is that, in cases like those at bar, the arrests and prosecutions violate the Constitution because the State itself has been a party to the underlying discrimination. To regain its neutrality and remove the only barrier now urged against its action, it suffices if the State terminates its objectionable inducement of discriminatory practices.

In summary, we submit that when the State, by its current laws, actions, and policies, brings about individual acts of discrimination in the conduct of a business open to the public at large, it cannot impose criminal sanctions upon those who have been excluded, on the theory that it is merely implementing a private property right. Americans, both black and white, may stand upon a more fundamental right: The right that government shall deny to no man the equal protection of the laws.

**CONCLUSION**

For the foregoing reasons, the judgments of conviction in these cases should be reversed.

Respectfully submitted.

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